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In the Supreme Court of the United States

OCTOBER TERM, 1938.

Nos. 772 AND 865.

H. P. HOOD & SONS, INC. AND
NOBLE'S MILK COMPANY,
Petitioners

v.

UNITED STATES OF AMERICA AND
HENRY A. WALLACE, SECRETARY OF AGRICULTURE,
Respondents

E. FRANK BRANON,
Petitioner

v.

UNITED STATES OF AMERICA AND
HENRY A. WALLACE, SECRETARY OF AGRICULTURE,
Respondents

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONERS, H. P. HOOD & SONS, INC., NOBLE'S MILK COMPANY, AND E. FRANK BRANON

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OPINIONS BELOW

The opinion of the District Court for the District of Massachusetts, dated February 23, 1939, is not yet reported but is printed in R. Vol. I, pp. 116-131. The prior opinion of that court, dated November 19, 1937, granting a temporary injunction is reported in 21 F. Supp. 321,

sub nomine United States et al. v. *Whiting Milk Company*, and is printed in R. Vol. I, pp. 107-114. The opinion and order of the Circuit Court of Appeals for the First Circuit, dated June 24, 1938, continuing both the temporary injunction and an order for supersedeas issued by the Senior Circuit Judge of that court, are reported in 97 F. (2d) 677 and are printed in R. Vol. I, pp. 114-116.

JURISDICTION

The decree of the District Court was entered March 9, 1939. The cause was docketed in the Circuit Court of Appeals on March 21, 1939. The petition of H. P. Hood & Sons, Inc. and Noble's Milk Company for a writ of certiorari was filed on March 24, 1939 and was granted on March 27, 1939. The petition of E. Frank Branon was filed on April 12, 1939 and was granted on April 17, 1939. The jurisdiction of this Court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTE AND ORDER INVOLVED

The statute involved is the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246; 7 U. S. C. §§601 *et seq.*) which re-enacts and amends some of the provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31) as amended by Act of August 24, 1935 (49 Stat. 750). It is set out in Appendix E, *infra*.

The order involved is Order No. 4 as amended by the order of the Secretary of Agriculture dated July 28, 1937. A compilation of the order incorporating the amendments is printed R. Vol. II, pp. 59-75 and is also set out in Appendix F, *infra*.

QUESTIONS PRESENTED

1. Whether the Agricultural Marketing Agreement Act of 1937 unconstitutionally delegates legislative power to the Secretary of Agriculture.

2. Whether the market-wide equalization or pooling device, authorized by the Act, and established by amended Order No. 4, deprives the petitioners of their property without due process of law, in violation of the Fifth Amendment.

3. Whether the amended Order No. 4 is invalid because the Secretary issued the amendments, based on the post-war base period, in disregard of section 2 of the Act without making in connection with their issuance the finding and proclamation required by sections 8c(17) and 8e.

4. Whether the sums demanded were due although the Market Administrator improperly included in the equalization pool milk of persons who were not producers within the meaning of Article I, Section 1, of the amended Order.

5. Whether the Secretary's determination that amended Order No. 4 was approved by the requisite majority of producers was in accordance with law and in compliance with sections 8c(9), (12) and (19) of the Act.[1]

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[1] This question, raised in our specification of errors to be urged, is not discussed in this brief. We adopt the arguments advanced on this point in the brief submitted by petitioners in *Whiting Milk Company* v. *United States, et al.*, No. 809, and by the appellee, Central New York Cooperative, in *United States, et al.* v. *Rock Royal Cooperative, et al.*, No. 771, as stated in footnote 3, page 24, *infra*.

STATEMENT

I. PROCEEDINGS BELOW.

On October 1, 1937 the plaintiffs-respondents filed their bill of complaint in the District Court for the District of Massachusetts to enjoin the petitioners H. P. Hood & Sons, Inc. and Noble's Milk Company from violating Order No. 4, as amended, regulating the handling of milk in the Greater Boston, Massachusetts, marketing area. The bill alleged that the defendants were engaged in handling milk in the current of interstate commerce or that directly burdened such commerce, that Order No. 4 and the amendments thereto were validly issued by the Secretary of Agriculture and in force, and that the defendants were subject to the terms thereof. Preliminary and permanent injunctions were prayed for (R. Vol. I, pp. 2-13). On November 30, 1937 the District Court issued a temporary mandatory injunction (R. Vol. I, p. 65), which was superseded on December 8, 1937 by order of the Senior Circuit Judge of the First Circuit upon condition that the defendants deposit in the registry of the District Court the amounts billed to them by the Market Administrator by reason of obligations imposed by amended Order No. 4 (R. Vol. I, pp. 66, 67). Upon appeal from the temporary injunction, the Circuit Court of Appeals for the First Circuit continued the supersedeas pending a final determination on the merits on appeal (97 F. (2d) 677). Under these orders $1,564,471.17 has been deposited by H. P. Hood & Sons, Inc. and Noble's Milk Company in the registry of the District Court (R. Vol. I, p. 131).

Defendants' answers alleged the unconstitutionality of the Agricultural Marketing Agreement Act, the invalidity of Order No. 4 and the amendments thereto, both

in respect to their terms and the manner of their issuance, and that no sums were due from them under the amended Order because it had been improperly administered (R. Vol. I, pp. 23-48).

E. Frank Branon, petitioner in case No. 865, a producer selling milk to H. P. Hood & Sons, Inc., applied for leave to intervene as a party defendant as the representative of all Hood producers and such leave was granted by the court (R. Vol. I, p. 68, Vol. II, p. 225). By his answer (R. Vol. I, pp. 68-77) he asserted the unconstitutionality of the Agricultural Marketing Agreement Act of 1937 and the invalidity of Order No. 4 and amendments thereto, alleged that the continued enforcement of the amended Order would cause pecuniary injury to producers selling to H. P. Hood & Sons, Inc., and prayed that the bill of complaint be dismissed.

The cause, together with twenty-seven companion cases, was referred to a Special Master to find the basic facts. On January 27, 1939 after more than sixty days of actual trial the Special Master's report was filed (R. Vol. I, p. 77; Vols. II and III). On February 23, 1939 the District Court rendered an opinion holding that the Act does not delegate legislative power to the Secretary of Agriculture, that the equalization or pooling device is constitutional, that the order and amendments were properly issued in respect to the determination of producer approval and in respect to the findings as to the base period, and that the administration of the amended Order was proper so far as the definition of a producer was involved. The defendants Hood and Noble filed their written waiver of the issues not decided by the District Court (R. Vol. I, p. 101), and on March 9, 1939 the final decree was entered enjoining them from violating Order No. 4, as amended on July 28, 1937, ordering the clerk to pay the sums deposited in the registry to the Market

Administrator for him to distribute in accordance with the decree, and denying the intervener Branon's prayer for relief (R. Vol. I, pp. 102-106). On the same day the defendants and the intervener filed their notice of appeal to the Circuit Court of Appeals for the First Circuit and orders for supersedeas were entered (R. Vol. I, pp. 132, 133). On March 21, 1939, the cause was docketed in that court.

The petition of H. P. Hood & Sons, Inc. and Noble's Milk Company for a writ of a certiorari was filed on March 24, 1939 and granted on March 27, 1939. The petition of E. Frank Branon was filed on April 12, 1939 and granted on April 17, 1939.

II. STATUTE INVOLVED.

The purpose of the Agricultural Marketing Agreement Act of 1937, fully and frankly set out in section 2, is to raise the purchasing power of farm products to their level during the so-called "base period", and no higher, by creating and maintaining orderly marketing conditions in interstate commerce, and, at the same time, to protect the interest of the consumer by raising the purchasing power of farm products only as rapidly as is feasible in view of the current consumptive demand and in the public interest. This purpose is to be attained through exercise of the power delegated to the Secretary of Agriculture to enter into marketing agreements with persons engaged in handling agricultural commodities in interstate commerce and to issue orders with respect to such handling of these commodities. The base period for all commodities except tobacco and potatoes is to be the pre-war period, August 1909-July 1914. There is one exception. Section 8e provides that, if the Secretary in connection with the making of a marketing agreement or the issuance

of an order finds and proclaims that satisfactory statistics are not available to show the purchasing power of the commodity in the pre-war base period, then the base period for the purposes of such agreement or such order shall be August 1919-July 1929 or the portion of that period for which statistics are available.

The machinery for the attainment of this goal is established by the following sections of the Act. Section 8b authorizes the Secretary of Agriculture to enter into marketing agreements with handlers and producers. Section 8c authorizes him to issue orders applicable to all persons engaged in the handling in interstate commerce of specified commodities in a given area. It is the latter section which is principally involved in the present case.

Section 8c(1) grants the general power to issue and amend orders. Section 8c(2) lists the commodities to which orders may be applied, one of them being milk. Next follow certain prerequisites to the valid issuance of orders. The Secretary must give timely notice of and hold a hearing upon any proposed order (section 8c (3)); and after the hearing, and upon the basis of the evidence introduced thereat, he must find that the issuance of the order and all its terms will tend to effectuate the declared policy of the Act (section 8c(4)).

Section 8c(8) requires that before orders become effective a marketing agreement shall first have been signed by the handlers of 50% of the volume of the commodity to be regulated and further that the Secretary shall have determined that the order is approved by two-thirds of the producers. But by the exception contained in section 8c(9), however, the Secretary is permitted to issue an order in spite of the refusal of handlers to sign such an agreement if he determines, first, that the refusal of handlers to sign an agreement prevents effectuation of

the policy of the Act, second, that the issuance of the order is the only practicable means of advancing the interests of the producers, and third, that the order is approved either by two-thirds of the producers producing the commodity for sale in the marketing area to be defined by the order or by the producers of two-thirds of the volume of such commodity sold in the area. To make that determination the Secretary may—as he did in the present case—conduct a referendum among producers (section 8c(19)). But, however the determination is made, he must consider the approval or disapproval of a cooperative association of producers as the approval or disapproval of its members (section 8c(12)).

The permissible terms in an order regulating the handling of milk are set forth in sections 8c(5) and 8c(7). Such an order must contain one or more of the terms listed in those sections and no others.

The first term (section 8c(5)(A)) is one classifying milk in accordance with its use and fixing prices, uniform as to all handlers, payable to producers, for each classification. Under such a term, the price each farmer received for his milk would be governed by the use to which it was put by the handler (i.e., dealer) who bought it. For example, the farmer whose milk was sold for consumption as fluid milk would be paid one price and the farmer whose milk was sold as butter would be paid another.

The second term (section 8c(5)(B)(i)) provides that a handler shall pay a uniform price to all producers or associations of producers selling milk to him. Since under an order embodying the first term, the handler would be obligated to pay for his milk at the use class prices, and since he commingles the milk of various producers delivering to him, it is impossible for him to tell the use to which milk purchased from any particular producer

is put. Under the second permissible term, therefore, he is required to determine his total financial obligation at the class prices and to divide that figure by the total number of units of milk he has bought. The result is a composite price which he must pay to each producer for each unit of milk delivered to him. The Secretary may not insert this term in an order unless three-fourths of all the producers agree.

The third permissible term (section 8c(5)(B)(ii)) is an alternative to the second. It provides for payment to all producers and associations of producers in the market of uniform prices irrespective of the uses made of their milk by the individual handler to whom they deliver it. Standing alone this term would simply impose upon all handlers the obligation to pay a uniform flat price for all milk delivered to them. If, however, it is used in an order embodying the first permissible term, i.e., the requirement that each handler pay on the basis of his own use of milk, there would be an apparent inconsistency. Handlers would pay on one basis, producers receive on another. The group of dealers whose milk had a use value higher than the amount they would be required to pay at the uniform prices would pay less than the use value of their milk. Others, whose milk had a lower use value would be required to pay more. The fourth term (section 8c(5)(C)), which the Secretary might include, would fill the gaps by compelling the first group to pay to the second the difference between the amounts it had paid to its producers and the full use value of its milk. In the end, therefore, producers would receive uniform prices and each handler would pay out the use value of his milk.

Neither the second nor the third term listed, however, must be included with the first.

The fifth permissible term (section 8c(5)(D)) authorizes the Secretary to require payments to new producers entering the market to be made at the lowest class price.

The sixth term (section 8c(5)(E)) deals with a new subject. An order may provide for market information to producers and for sundry other services.

The other terms which may be included in milk orders are not described by the Act in as great detail. The Secretary may include any term prohibiting unfair methods of competition or unfair trade practices (section 8c(7)(A)). He may designate an agency to administer his order (section 8c(7)(C)). Finally, he may include any incidental term necessary to effectuate the others (section 8c(7)(D)).

The Secretary may not include any term not listed in the Act (section 8c(5)). Neither may he provide marketing services for members of cooperative associations (section 8c(5)(E)), nor may such an association be prevented from treating the proceeds of its sales in accordance with its contract with its members (section 8c(5)(F)). Furthermore, there may be no regulation of the handling of milk in an area which would limit the marketing there of milk products produced elsewhere in the United States (section 8c(5)(G)). Other prohibitions are listed in sections 8c(10), (11) and (13), but they are immaterial to the present case.

Having spelled out the prerequisites and contents of milk orders, section 8c of the act then goes on to deal with the questions which would subsequently arise. Provision is made for the punishment of violations of any order (section 8c(14)) and for administrative review of any order or obligation imposed thereunder (section 8c(15)). Then, section 8c(16) directs the Secretary to terminate or suspend an order or any provision of an order if he finds that it does not tend to effectuate the policy of the

act or if he finds that more than half the producers are dissatisfied with the order.

Up to this point the act defines the powers of the Secretary and the limitations thereon in terms of original orders. Section 8c(17) however, covers the possibility of amendments by providing that the provisions of sections 8c, 8d and 8e applicable to orders shall be applicable to amendments to orders.

The remaining provisions of the Act have no relevance to the instant case.

III. THE ORDER INVOLVED.

A. The Promulgation and Amendment of Order No. 4.

The order of which the bill asked enforcement is the result of a series of administrative steps culminating in "Order No. 4 as amended" which became effective August 1, 1937. It is set out in full in the master's report (Vol. II, pp. 59-75) and is reprinted in Appendix F, *infra*.

Original Order No. 4 was promulgated February 7, 1936, after appropriate notice of hearings, hearings and findings by the Secretary under sections 8c(3) and 8c(4) of the Act (R. Vol. II, pp. 4-15). Prior to issuance of the order the Secretary, acting pursuant to section 8e, found and proclaimed that satisfactory statistics showing the purchasing power of milk during the base period established by section 2 of the Act (the pre-war period, 1909-1914) were not available and that the base period "for the purpose of . . . the issuance of an order" should be the post-war period, August, 1919-July, 1929 (R. Vol. II, p. 6, par. 4). The Secretary also made the appropriate determinations required by section 8c(9) of the Act (R. Vol. II, p. 7, par. 5).

On August 1, 1936, following an adverse court decision,[2] the Secretary wholly suspended Order No. 4 for an indefinite time. From that date till July 1, 1937, almost a year later, no regulation was in force in the Boston area (R. Vol. II, pp. 36, 40, 41, par. 7, 10). On June 19, 1937, however, steps were taken to put an order in force. Notice of hearings on a proposed new order was given but on June 24th the notice was cancelled and supplanted by a notice of hearings upon proposed amendments to Order No. 4 (R. Vol. II, pp. 37-43, par. 8, 9, 11). The next day, June 25th, the Secretary issued an order entitled "Termination of Suspension of Order No. 4" which purported to terminate the suspension of some provisions effective as of July 1st and of others, the price-fixing provisions, as of August 1, 1937 (R. Vol. II, p. 40, par. 10).

After the hearings upon the proposed amendments, the Secretary tentatively approved a proposed marketing agreement which handlers of more than 50% of the volume of the milk to be covered by the agreement failed to sign (R. Vol. II, p. 44, par. 13). Thereupon, the Secretary issued a determination stating first, that the failure of the handlers to sign the proposed agreement tended to prevent effectuation of the declared policy of the Act; second, that the issuance of amendments to the order was the only practical means of advancing the interests of milk producers in the area; and third, that the issuance of amendments was approved by over 70% of the producers who during May, 1937 had been engaged in the production of milk for sale in the marketing area (R. Vol. II, p. 44, par. 14). Such determinations are essential to the validity of an order or amendments issued without a marketing agreement (section 8c(9)).

[2] *United States* v. *David Buttrick Co.*, 15 F. Supp. 655.

The determination of producer approval was made upon the basis of a referendum conducted by the Secretary under section 8c(19) of the Act (R. Vol. II, p. 195). In the referendum each producer in New England who had delivered any milk in May, 1937 to a country receiving station which was licensed to ship fluid milk into any city or town in the Greater Boston area and which shipped either milk or cream into that area in May, 1937 was entitled to one vote. The percentage shipped from a plant was considered immaterial (R. Vol. II, p. 202, par. 202, 203). On the other hand, producers throughout the south and mid-west who delivered their milk to plants shipping a large percentage of their receipts into the area in the form of cream were not permitted to vote (R. Vol. II, p. 204, par. 207-209). Cooperative associations of producers voted as a unit by their respective Boards of Directors; the members were not requested by the Boards or the Secretary to express their opinions (R. Vol. II, pp. 198, 199). Finally, it should be noted that on each ballot there was printed a statement that unless the amendments were approved no price regulation would be enforced (R. Vol. III, pp. 160, 161). That was done in spite of the fact that the Secretary had terminated the suspension of original Order No. 4 effective as to the price-fixing provisions on August 1, 1937.

Immediately after he made the determination of producer approval on the basis of this referendum, the Secretary issued an "Order . . . amending Order No. 4". In doing so he referred to the procedural steps he had taken in promulgating the amendments, formally made the findings required by section 8c(4) of the Act, and reaffirmed those findings which he had made upon the evidence introduced at the hearings on the original order (R. Vol. II, pp. 46-49). He made no findings and proclamations other than those mentioned above (R. Vol. II,

p. 75, par. 17). Particularly, he did not make an express finding or proclamation that satisfactory statistics were not then available to show the purchasing power of milk in the pre-war base period, although in formulating the amendments he used the post-war period as a base.

B. The Background of the Amended Order and the Problem with which it Deals.

The primary provisions of the amended Order are those classifying and valuing milk in accordance with its use by the handler, fixing a minimum price for milk disposed of in fluid form (Class I), establishing a formula for fixing such a price for milk disposed of in non-fluid form (Class II), and setting up a market-wide pool for equalizing among all producers in the Boston market the proceeds of all sales of fluid milk in that market. Understanding of the purpose of these provisions and the mechanics adopted to carry them out will perhaps be aided by first considering the price problem in the Boston market raised by the existence of so-called "surplus" milk. Accordingly, before describing the terms of the amended Order in further detail, we turn to a brief discussion of that question.

Milk, although apparently a simple and homogeneous commodity, is disposed of in the market in a variety of forms, and it is with the problem of distributing the gains from the sales of milk in these various forms that the equalization provisions of the amended Order attempt to deal. A prime form in which milk is disposed of is as fluid milk. It is also disposed of in the form of cream, of butter, of cheese, of ice-cream, and of skim milk products. Milk disposed of as fluid milk has always commanded a higher price in the Boston market than milk disposed of in the form of cream, butter or other manu-

factured products (R. Vol. II, p. 97). In the first place, fluid milk costs more to produce because the producer must meet various health requirements, such as the use of cooling apparatus, sanitary precautions and the like, which are not applicable to the production of milk for cream or for manufacturing purposes (R. Vol. II, pp. 111, 112). In the second place, cream and manufactured milk products of New England must compete with similar products of milk produced in other parts of the United States and shipped into the Boston market (R. Vol. II, p. 97). Whereas the supply of fluid milk in the Boston market is pretty much confined to New England (R. Vol. II, p. 78), the supply of cream, butter and the like is drawn from the whole United States (R. Vol. II, pp. 80-86, 97).

This disparity in price would not seriously affect the producer of milk for disposal in fluid form were it not for the fact that there is a surplus of fluid milk in the market. This surplus is due on the one hand to the perishable character of milk and on the other hand to seasonal variations in production and fluctuations in demand. Although the demand for fluid milk is relatively constant, there are day-to-day and seasonal variations, and, since milk cannot be stored, there must always be a surplus of about 20 to 25 per cent of the total supply to meet the peak demand (R. Vol. II, pp. 94, 96). But the amount of milk produced varies greatly throughout the year, reaching its lowest point in November and its highest peak in June (R. Vol. II, p. 92). The number of cows necessary to produce 20 to 25 per cent surplus over demand at the low point of production in November will normally produce a much larger quantity in other seasons (R. Vol. II, p. 96). Thus, in 1937 the surplus was only the necessary amount of 25 per cent in November, but it had been 40 per cent in August (R. Vol. II,

p. 96). This surplus, originally produced for sale as fluid milk, must be disposed of in the market in other forms, such as cream, butter and the like. As to the portion of his product which cannot be disposed of as fluid milk, the producer is affected by the lower price of these other commodities.

Of course, the producer does not sell part of his milk to one dealer as fluid milk and part to another dealer as cream or butter. The dealers operating in the market buy milk as milk and dispose of it both in fluid form and as cream or in other manufactured form. And the producer sells milk to a dealer in fluid form not knowing what use he will make of it. Generally until about 1913 the dealers paid a flat price for all milk delivered—that is, a single fixed price announced in advance of the sale, based presumably upon estimates of how the milk would be utilized (R. Vol. II, p. 123). Thereafter, however, there developed the use price plan, whereby the dealer agreed to pay at one rate for milk used for fluid (and, hence, more profitable) purposes and at a different rate for milk used for non-fluid purposes (R. Vol. II, pp. 96, 122, 124). Milk disposed of as fluid milk was commonly denominated Class I milk and milk otherwise disposed of, Class II milk (R. Vol. II, p. 96). Under this system, guess-work as to how profitably the milk could be disposed of by the dealer was eliminated and the return to the producer was based on actual disposal. But since all milk is delivered to the dealer's plant in fluid form and commingled there with other milk, it is impossible to tell whether the milk of any particular producer is ultimately used by the dealer as Class I or Class II milk. Hence, the use of class prices necessitates a "dealer pool" whereby the dealer figures a composite price based on his average fluid and non-fluid sales at the respective class rates agreed upon and pays each producer that price (R.

Vol. II, pp. 122, 123). This system of classified prices and dealer pools prevailed generally in the Boston market from 1918 to the initiation of Federal regulation in 1933 (R. Vol. II, pp. 96, 124-129).

Since the composite price received by a producer was dependent upon the ratio of the dealer's fluid milk sales to his total sales, there has been a natural tendency on the part of producers to compete for a market for their milk through dealers having a high percentage of fluid sales (R. Vol. II, p. 98). In the absence of governmental control of prices, this competition has from time to time depressed the Class I price, and consequently the return to all producers (R. Vol. II, pp. 98, 99). Producers not having established outlets through such dealers, of course, have brought pressure to acquire a share in those outlets. From 1930 plans have from time to time been suggested to secure a market-wide pool of all sales and thus give to all producers a share in the fluid milk outlets of the entire market. These have all failed because of lack of approval by enough producers to make them feasible. (R. Vol. II, pp. 130-133). With the initiation of Federal regulation in the market, first through issuance of licenses in 1933 and 1934 and then through the original Order and the amended Order, the efforts of producers without established fluid outlets to attain a market-wide equalization pool met with success.

C. The provisions of Amended Order No. 4.

The provisions of the amended Order set up a comprehensive system of regulation in the charge of a Market Administrator. Article I defines the Greater Boston cities and towns to be the marketing area regulated, defines a handler as anyone who sells therein milk which is in the current of interstate commerce or directly bur-

dens or obstructs such commerce and defines a producer as anyone who produces milk in conformity with the health regulations applicable to the sale of fluid milk in the marketing area. Article II establishes the office of Market Administrator and prescribes the duties of its incumbent. Then follow the provisions which he is to administer.

Article III classifies milk in accordance with its use by the handler, defining Class I milk as milk sold as whole or flavored milk, and Class II milk as milk sold for any other purpose (i.e., cream, butter, evaporated milk, or casein, for example). This provision for use classification is in accordance with section 8c(5)(A) of the Act.

Article IV then provides for so-called "minimum prices" for each class of milk. The price for Class I milk is fixed and a formula is established for fixing the Class II price, which is to be computed and announced publicly by the Administrator at the end of each half-monthly delivery period. The formula is primarily based on the price of cream in Boston and casein in New York and reflects the competitive factors which, as we have shown, render the price of non-fluid milk lower than that of fluid or Class I milk.

Article V requires each handler to report for each delivery period the amount of milk he purchased and the amount of that total which he used or sold as Class I milk and the amount which he used or sold as Class II milk.

Article VII, section 1, requires the Administrator to compute for each period the "value" of all the milk purchased by the handler by multiplying the amount sold by him as Class I milk by the Class I rate and the amount sold as Class II by the Class II rate and adding the resulting value of each class. This total value is not distributed among the producers from whom the handler bought this milk under a "dealer pool", permitted

by section 8c(5)(B)(i) of the Act. Instead the amended Order adopts the principle of a market-wide pool, authorized by sections 8c(5)(B)(ii) and 8c(5)(C) of the Act. Under this scheme the Market Administrator computes a composite blended price based on the value of all the milk sold by all handlers in the market. The computation and announcement by the Administrator of this blended price is provided for in Article VII, section 2. Under Article VIII each handler is required to pay to each producer from whom he buys milk the blended price per hundredweight for the quantity of milk delivered by such producer. If the total amount he owes his producers is less than the "value" of his milk, computed under the provisions of Article VII, such handler must then pay the difference to the Administrator. This difference is the so-called equalization payment or producer settlement charge. If that amount is greater than the "value" of his milk, such handler receives from the Market Administrator the difference. Thus, under the provisions of this article the Market Administrator acts as a conduit to transfer the equalization payment from one handler or group of handlers to another. The provision for these equalization payments is authorized by section 8c(5)(C) of the Act: "a method for making adjustments as among handlers".

The practical operation of the provisions of Articles VII and VIII are shown by the actual computations described in the Master's Report (R. Vol. II, pp. 137-163), but the scheme may perhaps be more clearly explained by the following simplified illustration:

Assume that there are only two handlers, A and B, in the market and that the prices fixed by Article IV of the order are $3.00 for Class I and $1.50 for Class II. If Handler A purchased 200,000 cwt. of milk and sold 175,000 cwt. as fluid, or Class I, milk and 25,000 cwt. as

manufactured, or Class II, milk, the Administrator, in accordance with section 1 of Article VII, would compute the value of A's milk from A's reports made under Article V, as follows:

Class I	175,000 cwt. x $3.00	=	$525,000.
Class II	25,000 cwt. x 1.50	=	37,500.
Total value for Handler A			$562,500.

If B purchased 150,000 cwt. and sold 50,000 cwt. as Class I and 100,000 cwt. as Class II, a similar computation would be made to determine the value of his milk:

Class I	50,000 cwt. x $3.00	=	$150,000.
Class II	100,000 cwt. x 1.50	=	150,000.
Total value for Handler B			$300,000.

Under section 2 of Article VII the Market Administrator then computes the "blended price" as follows: The total value of the milk in the market is computed by combining into one total the value of the milk for each handler (Art. VII, sec. 2, par. 1):

Handler A	$562,500.
Handler B	300,000.
Total	$862,500.

Then, this sum is divided by the total number of hundredweight sold by A and B, in order to obtain the "blended" price (Art. VII, sec. 2, par. 4):

$$\$862,500 \div 350,000 \text{ cwt.} = \$2.46+ \text{ per cwt.}$$

(Several calculations involving freight and other differentials are omitted; those given are the essence of the scheme.)

Under Article VIII, section 1, paragraph 1 both A and B must pay their respective producers the blended price per hundredweight. A will pay 200,000 cwt. x $2.46 =

$492,000, and B will pay 175,000 cwt. x $2.46 = $430,000. It will be noticed that A's payments to his producers will be less than the value assigned to his milk, whereas B's will exceed that value:

	Handler A	*Handler B*
Total Value	$562,000.	$300,000.
Producer payments	492,000.	430,000.
	$ 70,000	—$ 70,000.

By paragraph 3 of Article VIII, section 1, A is required to pay that $70,000 to the Market Administrator who turns a like sum over to B.

Articles IX and X of the amended Order deal with a different subject. The former requires each handler to deduct from the payments to his producers an amount to be determined by the Administrator and expended by him in rendering marketing services to producers. This term, inserted under the permission granted by section 8c(5)(E) of the Act, is not applicable to producers who are members of a cooperative association. Article X requires handlers to bear the expense of the order's administration in proportion to the quantity of milk they buy; its inclusion is authorized by section 10(b)(2) of the Act.

SPECIFICATION OF ERRORS TO BE URGED

The petitioners specify all the assigned errors set out in their several statements of errors as the assigned errors intended to be urged, excepting only the ninth error assigned by the petitioner H. P. Hood & Sons, Inc. (R. Vol. I, pp. 137-141). They may be summarized as follows:

The District Court erred:

1. In entering a decree commanding the petitioners H. P. Hood & Sons, Inc. and Noble's Milk Company to comply with the provisions of Order No. 4 as amended on July 28, 1937 and directing the Clerk of the District Court to pay to the Market Administrator the monies deposited in the registry of the District Court in compliance with the interlocutory decree entered by the District Court on November 30, 1937, as modified and superseded by the decree and order of the Circuit Court of Appeals for the First Circuit entered on June 24, 1938 (97 F. (2d) 677).

2. In ruling that the Agricultural Marketing Agreement Act of 1937 does not unconstitutionally delegate to the Secretary of Agriculture the legislative power conferred upon the Congress in article 1, section 1 and section 8 of the Constitution.

3. In ruling that sections 8c(5)(A), 8c(5)(B)(ii) and 8c(5)(C) of the Agricultural Marketing Agreement Act of 1937, as applied by Article IV, Article VII and Article VIII, section 1, paragraph 3 of Order No. 4 as amended, are a valid exercise of the power to regulate interstate commerce and do not deprive the petitioners of their property without due process of law and without just compensation in violation of the Fifth Amendment.

4. In ruling that the amendments of July 28, 1937 to Order No. 4, for the purposes of which the Secretary of Agriculture used the post-war instead of the pre-war base period, were validly issued although the Secretary did not make in connection with their issuance the express finding and proclamation which is required by sections 8c(17) and 8e of the Act.

5. In ruling that the Market Administrator acted in accordance with the terms of Order No. 4 as amended in including, in the computation of the blended price, milk delivered by farmers to a country plant approved by one or more of the towns in the marketing area for shipment of milk into the area, irrespective of whether such farmers had certificates of registration issued pursuant to sections 16A-16C of chapter 94 of the General Laws of Massachusetts.

6. In ruling that the amendments of July 28, 1937 to Order No. 4 must be considered as validly issued in accordance with the Agricultural Marketing Agreement Act of 1937 although the determination of the Secretary of Agriculture required by section 8c(9) of the Act,—that the proposed amendments were approved by more than two-thirds of the producers producing milk or its products for the sale in the marketing area—was based solely upon a referendum conducted contrary to sections 8c(9), 8c(12) and 8c(19) of the Act in the following respects:

(a) a large number of producers who delivered their milk to stations shipping only cream to the marketing area in the representative period designated by the Secretary of Agriculture were not permitted to vote in said referendum whereas the votes of other producers who delivered their milk to stations shipping only cream into the marketing area in such period were counted in said referendum,

(b) votes of producers who delivered their milk to plants shipping less than 50% of their total milk receipts to the marketing area in said representative period were counted,

(c) the votes of all the members of New England Dairies, Inc. and of New England Milk Producers Association were counted in favor of said amendments

solely on the basis of a ballot cast by the board of directors of such organization,

(d) the votes of a substantial number of farmers who did not have certificates of registration issued pursuant to chapter 94, sections 16A-16C of the General Laws of Massachusetts were counted.[3]

SUMMARY OF ARGUMENT

I.

The Agricultural Marketing Agreement Act of 1937 is not self-operative. It delegates the efficient regulatory power to the Secretary of Agriculture. Without adequate guidance from the Act, he alone decides whether, when and where to regulate the handling of a commodity such as milk. He alone, unlimited by a standard governing his selection from many choices, also prescribes a fundamental program of regulation. Taken as a whole, the Act delegates the plenary power to regulate the dairying industry and guides its exercise only by directing the Secretary to weigh the conflicting interests which the lawmaker must resolve.

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[3] We shall not discuss this error in our brief. With respect to the faults mentioned in paragraphs (a), (b) and (d) of the assignment we adopt the brief submitted by the petitioners in *Whiting Milk Company* v. *United States et al.*, No. 809. That case and this one arise upon the same facts (R. Vol. II, pp. 1, 4). With respect to the fault mentioned in paragraph (c), we refer the Court to pp. 31, 32 of the brief for the Central New York Cooperative Association, appellee, in *United States et al.* v. *Rock Royal Cooperative, Inc. et al.*, No. 771. Cooperatives were permitted to vote and voted in the same manner both on proposed Order No. 27 and on the proposed amendments to Order No. 4. Had the votes cast by cooperatives for their members been eliminated in counting the votes or the amendments to Order No. 4, the required producer approval would not have been obtained (R. Vol. II, pp. 198-205).

The Secretary's power to choose the time for regulation is limited by the Act only by reference to the policy declared in section 2. One purpose is to raise the prices of farm products to a level that will give them a purchasing power equivalent to their purchasing power in the pre-war period. That purpose is only verbally precise. The parity concept cannot be applied in practice because the past and present purchasing power of milk produced in the Boston milkshed, for example, is unknown and unknowable. Consequently, the first part of the declared policy is in practice only an admonition to aid any group of producers whose status seems to need improvement. The Secretary cannot avoid deciding that question on the basis of his individual opinion. The second part of the declared policy requires the Secretary to protect the interest of the consumer by raising farm prices only as rapidly as is "in the public interest" and "feasible in view of current consumptive demand." Even if the parity concept were precise, therefore, the Secretary would issue or not issue orders accordingly as he believed that the interest of the farmer outweighed the interest of the consumer and that the regulation would be for the good of the community and practicable in the light of existing conditions. Moreover, the Secretary may issue any order when he finds it will "tend to achieve" the declared policy. Thus, the only finding which limits his discretion is a vague prophecy upon broad economic trends. The Act, therefore, neither establishes an extrinsic standard to guide the Secretary in deciding when there shall be regulation nor prescribes any facts upon the occurrence of which regulation must be invoked.

The Act also delegates to the Secretary power to choose a program of regulation. As the declared policy fixes no time for regulation so is it too vague to limit the choice

from the schemes of regulation which it permits. But, were the declared policy a definite and specific requirement that the Secretary should raise farm prices at a precise rate, still the delegated powers would be excessive. The Secretary may properly be given power to fix reasonable prices and to adapt a legislative program to local circumstance. Under sections 8c(5) and 8c(7), however, any one or more of three fundamental programs of regulation may be established. First, the Secretary may assist the producers to acquire higher prices by bargaining with handlers. Second, he may indirectly stabilize the resale price structure. It immediately affects farm prices. Third, he may directly fix in one of several ways prices payable by dealers for milk delivered. The Act permits but does not require him to compel producers to share their fluid milk outlets. Each of these programs and any combination thereof is suited to achieving the objects of the Act. Therefore the Secretary must look beyond the declared purposes in formulating his orders and issue those which he believes to be politic. Manifestly the choice is between fundamental controls. The programs in operation would have vitally different affects upon both dealer and producer. Making the choice on the basis of his unconfined discretion the Secretary exercises law-making powers.

Congress easily could and should have formulated more complete legislation. It has done so in other more complicated fields, such as the field of transportation. It has established for the tobacco industry a comprehensive program. The Agricultural Marketing Agreement Act of 1937, however, is organic only. Traditionally and properly the law-maker has selected an ultimate objective from often antagonistic interests, has determined the occasion for seeking it which involves the smallest sacrifice of only slightly less desirable aims and has chosen

that program for attaining the objective which was most consistent with his view of the public interest. By this Act, Congress at the most fixed an ultimate goal—raising farm prices. Beyond that point the Act simply transfers the power to fix policies and then to formulate a definitive program for achieving them. The Secretary's duty even is legislative, the duty to consider the chief conflicting interests—those of the farmer in high and the consumer in low prices—and to resolve them into some program according to his view of practicability, "feasibility", and his synthesis of all antagonistic demands, "the public interest".

II.

The equalization provisions of the amended Order deprive the petitioners of their property without due process of law. Those provisions have as their aim and effect a redistribution of purchasing power among all farmers in the milkshed by giving to each producer a pro rata share in the established fluid milk outlets now possessed by some. The Order adopts the system, generally prevailing in the Boston market prior to this regulation, of fixing different rates to be paid by a handler for milk disposed of by him as fluid milk, and milk disposed of for non-fluid purposes. But, by virtue of the equalization provisions, producers selling to handlers with a high percentage of fluid use are deprived of part of the benefit of his fluid sales. They are paid only on the basis of the market average of fluid sales and the balance of the value of the milk they sell is transferred, by means of equalization payments, to handlers who have a less than market average of fluid sales. The fluid market is economically a limited one. Increase of the share of one group of handlers or producers therein can be at-

tained only by decreasing the share others already have. In practical operation, the equalization scheme has reduced the net return to producers, like the petitioner Branon, who had established outlets for their product through handlers with a high percentage of fluid sales.

The scheme also has a significant economic effect upon such handlers. By requiring them to pay part of the use value of their milk by way of equalization charges to other handlers instead of to their own producers, they lose their ability to control their supply and are forced to furnish the means to their competitors to win away the fluid milk market from them.

Moreover, the amended Order discriminates against proprietary handlers, who at present have the bulk of the fluid milk markets, and so are required to make equalization payments, in favor of cooperative associations. Under the provisions of the Act, such cooperatives cannot be required to make equalization payments themselves, and if they subsequently become the principal fluid milk distributors, the provisions of the amended Order for equalization payments cannot be enforced against them. They receive, but need not pay.

The effort to compel those having valuable fluid markets to give the benefits thereof to their rivals stands condemned under *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55. The necessity of dealing with surplus so as to prevent destruction of commerce in milk through price cutting and disorderly marketing conditions does not sustain this redistribution of the fluid milk market. The quantity of surplus in the Boston market is no greater than during the period from 1919-1929, which, in this very Act, Congress has declared was a relatively normal period in which such commerce was free of burdens. Evidence that during the years preceding federal regulation surplus has led to price

cutting may justify the price fixing provisions of the amended Order, but it has no tendency to show that when minimum prices are fixed by law the surplus causes any further problem.

Fundamentally, the equalization provisions rest upon the doctrinaire conception that all differences in return are inequitable. They ignore the fact that producers with established fluid milk markets have earned them by taking their own steps to avoid the production of surplus milk. By fixing prices, the amended Order tends to stimulate further production and draw new producers into the already over-crowded market, thus imposing an ever increasing burden upon these producers in the name of fairness.

The equalization scheme cannot be sustained by analogy to workmen's compensation acts and bank deposit insurance acts which took comparatively insignificant amounts of private property from employers and banks to assure that workmen and depositors would not be left remediless for losses caused to them without their fault by the insolvency of the particular employer or bank with whom they happened to deal. Here what is prorated is not loss to third persons but the profits accruing to some in the business. The decisions upholding those statutes did not lay down the sweeping principle that all banks or all employers could be treated as a single unit in order to insure that all would receive the same return from their businesses.

Nor do the decisions of this Court upholding the provisions of the Transportation Act of 1920 for a division of joint rates and recapture of excess earnings support the present scheme. Unlike the railroad, the producer or handler has not received a franchise as a quasi-monopoly obligating him to limit his profits to a fair and reasonable return upon the capital invested in his business. And

even if he had, no attempt is here made to determine that what is left to him after diversion of a part of his market to others leaves him with the fair and reasonable profit to which even a public utility is constitutionally entitled.

III.

The basic policy and purpose of the Act, as declared in section 2, is to raise the purchasing power of certain agricultural commodities to the level of the pre-war years 1909-1914. That is the base period to be used in formulating any milk program under the statute. There is but one exception, based upon necessity. If the Secretary of Agriculture finds and proclaims in connection with the issuance of a marketing agreement or order that satisfactory statistics are not available to show the purchasing power of the commodity during the pre-war period, then, under section 8e, the base period "for the purposes of such order shall be" the post-war period 1919-1929. The Secretary made such a finding and proclamation in connection with the issuance of the original Order No. 4. He was required to, but did not, make a similar finding in connection with the issuance of amendments to that order, based, like the order itself, upon statistics for the post-war period.

The plain language of section 8e shows that a finding by the Secretary as to the unavailability of adequate statistics for the pre-war period does not permanently fix the post-war period as the base period for all purposes, but only for the purposes of the particular order in connection with which the finding was made. Manifestly a new order would require a new finding and proclamation. But amendments may differ from a new order in name only. That was clearly the case here. In form, these amendments were promulgated as an "order"

amending Order No. 4. In substance they were a new order also. For more than ten months Order No. 4 had been suspended and there had been no federal regulation of milk in Boston. The issuance of the amendments represented a new start. In the amended Order only the broad objective and a part of the administrative framework of the original order were preserved. The factors controlling determination of the blended prices to be paid by dealers and received by producers, which represent the crux of the plan of regulation selected, were radically altered. The amended Order in its most vital aspects and taken as a whole was new. Therefore, a new finding that satisfactory statistics for the pre-war period were not available, if such was the fact, should have been made and proclaimed. Congress throughout the Act recognized and preserved in the words the difference in substance between orders and amendments, using both words when it intended both to be included. In section 8e it used the word "order" alone. A finding expressly declared to be effective "for the purposes of such order" cannot consistently with the statutory language be treated as effective for the purposes of amendments. Section 8e, since it creates an exception to the general rule of section 2, must be strictly construed.

Furthermore, the Act affirmatively requires a new section 8e finding to be made and proclaimed if post-war statistics are to be used for the purposes of amendments to an order. This is apparent, first, in the provisions concerning marketing agreements. Orders may be issued with or without executed marketing agreements. But even if a majority of the handlers have failed to execute an agreement, and an order has been issued without one, any amendments to such order must be accompanied by a proposed new agreement. And a proposed new agree-

ment itself requires a finding under section 8e before the post-war period may be used as a base.

In the second place, the structure of the Act and the provisions of section 8c(17) compel this conclusion. Section 8c(17) expressly makes applicable to amendments all the other subsections of section 8c and the provisions of sections 8d and 8e which together establish a complete system for the formulation, issuance, administration and termination of orders. It clearly contemplates that in all respects amendments shall be treated precisely as orders are treated. By its express reference to section 8e it leaves no doubt that as in the case of orders, so in the case of amendments, a finding under that section must be made if post-war rather than pre-war parity is to be the goal.

Finally, our interpretation of the Act derives support from section 8c(18) which specifically directs the Secretary, prior to prescribing "any term in any marketing agreement or order or amendment thereto", if that term fixes milk prices, to compute a parity price "in accordance with section 2 and section 8e." That provision was enacted two years after the law first became effective and shows what Congress believed it had already required by sections 2, 8c(17) and 8e.

To require the Secretary to make a new finding under section 8e in connection with the issuance of amendments to an order would advance the declared policy of the Act, namely, to achieve pre-war parity. Promulgation of amendments, like the issuance of a new order superseding an old one, furnishes an appropriate occasion for re-examination of available statistics for the purpose of ascertaining whether use of the pre-war period as the base has become possible in the light of current economic research. Such re-examination would tend to safeguard against the inadvertent use of the post-war period when

figures for the pre-war period were at hand, and would prevent unwitting violation of the express statutory prohibition against raising prices above the pre-war level. Moreover, the burden of making a section 8e finding—the inquiry being limited to data available in the Secretary's own department—is negligible compared with the burden of complying with other procedural requirements which are clearly and admittedly applicable to the issuance of amendments, such as the holding of public hearings and referenda throughout the marketing area.

It is conceded that no separate or express finding was made or proclaimed in connection with the issuance of the amendments to Order No. 4 or the marketing agreement proposed to accompany them. Nor was there an implied reaffirmation of the original section 8e finding in the recitals preceding the amendments. In those recitals the Secretary ratified and affirmed only "the findings made upon the evidence introduced at the hearing on said order." The section 8e finding was clearly not one of these, since it neither had to be, nor purported to be, made upon the basis of evidence introduced at the hearing. In any event, it is well settled by decisions of this Court that where a finding is required by statute it must clearly and expressly appear and cannot be supplied by implication or by a strained construction of the words. Manifestly, the recitals preceding the amendments to Order No. 4 fall far short of meeting that test.

Where Congress has, as it did here, conditioned administrative power upon an administrative finding, the finding is the statutory basis of the power. It is evidence of the existence of the "quasi-jurisdictional" facts essential to the validity of the administrative action. Upon both principle and authority the action is void when the finding is lacking. The statutory finding was not made and proclaimed in connection with the issuance of the

amendments to Order No. 4. They were, therefore, nullities.

IV.

The Market Administrator did not comply with the provisions of the amended Order in computing blended prices and equalization payments. He included in those computations milk delivered to handlers by producers who possessed no certificate, required under the provisions of Massachusetts statutes as a prerequisite to selling milk, showing that the farms on which they had produced that milk complied with the minimum sanitary requirements laid down by the Commonwealth. The amended Order, however, specifically provides that only milk produced and sold in accordance with the applicable health requirements in the Boston market shall be taken into account in determining the blended price or the obligation of handlers to pay equalization charges or minimum prices. Article VII of the Order requires the Administrator to compute blended prices on the basis of milk purchased by handlers from "producers". Article I of the Order defines "producer" as "any person who, in conformity with the health regulations which are applicable to milk which is sold for consumption as fluid milk in the Marketing Area, produces milk and distributes, or delivers to a handler, milk of his own production". The test as to whether milk is to be included, therefore, is whether it has been produced in such a way that, under the health regulations in the market, it can be sold therein.

The health regulations applicable to milk sold in the area to which the Order applies are two-fold. First, there are the general requirements laid down by the statutes applying to all milk sold anywhere in Massachusetts. Second, there are the requirements imposed by the several municipalities governing the sale of milk

within their limits. Milk sold anywhere in Massachusetts must meet certain general standards as to butterfat and solid content and must be free from impurities and unadulterated. In addition, it must be produced on a farm which has been certified as complying with certain minimum sanitary requirements. By the express provisions of Section 16A of Chapter 94 of the Massachusetts General Laws "no person shall sell . . . milk produced on a dairy farm unless as to such farm a certificate of registration has been issued . . . and is in full force and effect." This provision, designed to insure that the source from which the milk comes has been inspected and found clean and sanitary, is a fundamental health requirement applicable to all milk sold anywhere in Massachusetts. The Administrator, however, did not take into account this provision of the statutes. Although milk produced on farms which had no such certificate was reported to him, he did not exclude it from his computations. He looked only to see if the *handler* to whom it was delivered by the producer was licensed by the municipal authorities of *any* city or town in the marketing area to sell milk in that municipality and if the handler's plant from which that milk was distributed had been approved by the municipal licensing authorities. Thus he assumed that compliance with the local municipal requirements was enough. But the fact that the handler possesses an occupational license to sell milk in a single city in the area plainly does not warrant him or his producers in disregarding the general requirement against the sale of milk produced on an uncertificated farm.

The Administrator was not warranted in applying his own test of what met the health requirements rather than the test laid down by the Order because of the difficulty, or even impossibility, of determining from information available to him what producers possessed certificates.

If actual experience in operating under the Order as written showed the unworkability of the scheme, the only proper course was for the Secretary to change his definition of "producer" by amending the Order in accordance with the procedure laid down by the statutes. In orders in other marketing areas, including one in Massachusetts, issued since the present litigation, "producer" has been differently defined, doubtless to avoid such questions as are raised in this case. But, since no such change was made in this Order, the Administrator was bound to follow it as written.

The Master has found that the Administrator's errors in computation affected the amount of the blended price in every delivery period from August 1 through December 31, 1937. Producers, therefore, are entitled to have the Administrator recompute the blended price for each such period in accordance with a proper construction of the Order. And, since the amount of the blended price is the index by which equalization payments due from handlers are determined, the amounts demanded by the Administrator from the petitioning handlers, which the Court has ordered them to pay, were not due him. A recomputation of the equalization payments for each such period is required so that the extent of their liability may be correctly determined.

ARGUMENT

I.

THE ACT IS INVALID BECAUSE IT DELEGATES LEGISLATIVE POWER TO AN ADMINISTRATIVE OFFICER.

The distinction between an unconstitutional and a permissible delegation of legislative power is the difference between "the delegation of power to make the law

which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law." *Field* v. *Clark*, 143 U. S. 649, 693. The genesis of legislation is the resolution of conflicting interests and the selection of some for advancement in the manner thought to be most consistent with others often antagonistic but only slightly less desired. At the least, therefore, the lawmaker will first choose a definite aim. Second, he will decide what is to be regulated and when and where it shall be regulated. Third, he will establish a general program defining the mode of regulation. Under the Agricultural Marketing Agreement Act the Secretary makes those decisions. He has been given a vague goal to achieve, and no more. The choice of an occasion to commence and carry on the effort is his. The Act simply enjoins him to make the decision after considering the same antagonistic interests which confront the lawmaker. Therefore, the power to decide whether there shall be regulation is unconstitutionally delegated. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388. The Act also transfers to him power to choose a program of regulation. The ultimate goal set for him does not control the selection. Therefore, the power to choose the manner of regulation is unconstitutionally delegated. *A. L. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495. We consider these points in order. The combined power is the more excessive.

A. Power to Determine When, Where and What Commodities Shall Be Regulated Is Unlawfully Delegated.

The Agricultural Marketing Agreement Act of 1937 does not itself create obligations binding handlers of any commodity. The Secretary of Agriculture *may* select

milk. Section 8c(2) lists six important agricultural commodities and their products, including milk, as appropriate subjects of regulation. How the Secretary shall choose one or all is not specified. Section 8c(2) also permits regulation of a regional classification of a commodity. It does not describe either the size of the area to be covered by an order or the particular areas to be affected thereby. The absence of geographical delimitations is particularly striking in the case of milk. Section 8c(11)(B), which sets forth the only geographical limitations contained in the Act, is not applicable thereto. Under Section 8c the Secretary is also granted power to determine when there shall be regulation, to choose a time for its initiation, suspension or termination.

The substantive provisions of the Act purport to describe what commodities shall be regulated, and when and where they shall be regulated, only by reference to the declaration of policy. The administrative machinery is to be set in motion whenever the Secretary "has reason to believe that the issuance of an order will tend to effectuate the declared policy . . . with respect to any [listed] commodity" (Section 8c(3)). The order shall issue if the Secretary finds that it and all its terms "will tend to effectuate the declared policy" (Section 8c(4)). It is to be terminated or suspended upon a finding that it does not tend to do so (Section 8c(16)). These provisions of the Act, therefore, contain no mandate to invoke regulation of a certain commodity in a particular area upon the occurrence of a specified event. It is necessary to turn to the declared policy to discover whether at any time there shall be regulation.

The policy of the Act is declared by Section 2. It states two purposes. The first is to maintain orderly marketing conditions that will establish such prices to farmers as will give agricultural products a purchasing power equiva-

lent to their purchasing power in the period 1909-1914, and as will reflect any changes in interest rates and tax payments. The second is to protect the interest of the consumer by raising the price level of farm products only as rapidly as the Secretary deems to be "in the public interest and feasible in view of current consumptive demand".[4]

Assume that the first purpose was the only direction given to the Secretary. Assume that the Secretary was to issue an order whenever the purchasing power of milk dropped below parity. Even then there would not be an intelligible standard to govern him in determining whether he should regulate the handling of certain milk.

In theory, the disparity in the purchasing power of a commodity in two different periods is a fact susceptible of precise determination. The purchasing power of an hundredweight of milk, for example, is the amount of goods it will purchase of the kind which milk producers buy. Hence, the abstract parity concept appears to have mathematical precision. It may properly be expressed in the following formula:

$$\frac{\text{Cost to milk producers affected by the Order of articles bought by them in base period}}{\text{Cost to milk producers affected by the Order of articles being bought by them in instant period}} = \frac{\text{Milk Prices in Base Period}}{\text{Parity Price}}$$

[4] Section 8c(18) is, in effect, a subsidiary declaration of policy. It is of no consequence here. It applies only when an order is to contain terms fixing the prices of milk. It governs only the price to be fixed. Doubtless, expediency requires that the Secretary determine what is the reasonable price, if he is to fix a minimum. The questions we raise, however, have to do not with the latitude permitted in actually fixing a price but with the latitude permitted in choosing whether to regulate the handling of milk at all and what form the regulation shall take. To those questions section 8c(18) has no relevance. We disregard it.

This formula is the first part of the declared policy.[5] Upon the assumption mentioned, the Secretary *in theory* has only to apply the formula to milk producers and milk prices in the Boston, New York, St. Louis or other milk sheds to determine whether at the moment there shall be regulation in a market.

The vice in this standard is that it is an abstraction only. The Secretary cannot, and *in practice* has not, ascertained either the cost to New England milk producers of an average bill of goods bought in the base period or the cost to New England milk producers of an average bill of goods bought in the instant period. Therefore, the purchasing power of milk in the two periods could not be compared even if the milk prices were known and comparable. The true basis of a conclusion that the local prices are less than parity may be cloaked in mathematical computations. In the final analysis it is only an opinion that the producers should receive higher prices.[6]

The calculations leading to the issuance of Order No. 4 and its amendments fairly illustrate that conclusion. The Secretary used a series of index numbers to represent the cost of articles bought (R. Vol. II, p. 207, par.

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[5] Strictly to cover the entire purpose of section 2(1) it would be necessary to construct similar formulae for interest and tax payments. The calculation of the unknown in each would be made and the results weighted according to the relative amount of expenditures for each of the three purposes both in the base and in the instant period.

[6] "Parity price, therefore, must not be taken too seriously as the goal or limit of the price-raising activities of the AAA. It must be considered a rough indicator of the price increase to be sought." Black, *The Dairy Industry and the AAA*, Brookings Institution (1935), p. 7. "Both its concreteness and its look of reasonableness made it serviceable as a slogan in popular discussion and congressional debate and legally acceptable as an administrative formula under which Congress could delegate its legislative authority to the Secretary of Agriculture." Nourse et al., *Three Years of the AAA*, Brookings Institution (1937) p. 452.

215). That would have been proper had the index fairly represented the change between the two periods (R. Vol. II, p. 205, par. 213). The one used was inappropriate. It showed the cost fluctuations of a fixed bill of goods. Each of the items and groups of items from which the composite index was drawn was given one weight for all years (R. Vol. II, p. 207, par. 215; Exh. 17, R. Vol. III, pp. 164, 200-201). The relative amount spent for each group of articles manifestly varies from year to year and over a period of years. Careful application of the parity formula would require correction of the index numbers.[7] Nor does the series make any allowance for changes in the quality or utility of articles bought (R. Vol. III, p. 167). Both change greatly over a period of years. For example, should cooling apparatus be selling for the same price in the base and instant periods and the price of milk be constant, the increase in the durability and efficiency of the apparatus would be an increase in the purchasing power of milk. A reasonable use of the index numbers to supply the factors in the parity formula would involve adjusting them to reflect those changes.[8]

There is another, perhaps greater, difficulty in the practical use of the parity formula as a definitive standard. To determine in accordance with it whether at any moment there shall be a regulation of a regional classi-

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[7] The pamphlet of the Department of Agriculture states in explaining the index numbers, "Users of these index numbers of prices paid by farmers are cautioned against their misinterpretation and misuse. These price index numbers do not measure changes in farm expenditures, but merely show changes in the value of a fixed bill of goods. . . ." (Exh. 17, R. Vol. III, pp. 164, 166).

[8] "Any careful or critical appraisal of changes in prices, however, must take into account the fact that the commodities represented may not be, and are likely not to be, exactly the same between two distant periods of time" (Exh. 17, R. Vol. III, p. 167).

fication of a commodity, the Secretary must evaluate the changes in the cost of articles bought *by producers of the particular commodity in a particular region.*

The Secretary used a nation-wide series in issuing and amending Order No. 4, apparently because it was the best available (R. Vol. II, p. 207, par. 215).* The percentage of change in the cost of articles bought by the average farmer is a poor guide to the percentage of change in the cost of articles bought by the New England milk producer. Facts of common knowledge force that conclusion. Prices of articles bought vary throughout the sections, and vary relatively over a period with the geographical movement of industries. The character of articles bought is widely divergent as among farmers engaged in different activities. A large increase in the cost of one group of articles entering into the final index number and weighted for the average farmer will cause the final index to rise. But if that group of articles is not bought by the producers of the commodity under study, an appropriate index number for their purchases would not rise. For example, the milk producer buys comparatively little seed or farm machinery. His principal production costs are feed and labor. The large southern and western farmer, on the other hand, buys a great deal of seed and machinery. The national average is somewhere between, and representative of neither. The national index is strikingly inapplicable as a means of determining the relative purchasing power of New England milk producers. In 1935 when Order No. 4 was issued, the prices of seed and machinery were up 50%

*There are no geographically segregated indices of prices paid by farmers. The only available series is national in its scope. *Prices Paid By Farmers For Goods And Services And Received By Them For Farm Products*, 1790-1871; *Wages Of Farm Labor*, 1780-1937, T. M. Adams, University of Vermont and State Agricultural College (February 1939).

from the pre-war base (R. Vol. II, pp. 162-163). Those are the two articles least bought by New England producers. Feed, on the other hand, had risen only 11% (R. Vol. II, pp. 162-163). It is one of the milk producers' chief purchases.

The conclusions the Secretary drew after using this index to supply two decisive factors in the parity formula, may have been reasonable. The purchasing power of milk produced for the Boston market may have been below parity when Order No. 4 was issued. No one could prove that it was not. The fact is not capable of ascertainment because the past and present purchasing power of that milk are unknown and unknowable. They exist only in the abstract. Thus, the Secretary is inevitably thrown back upon the seemingly nearest equivalents—the comparative prosperity of the particular group of producers in the base and instant periods. Whether he adjusts the nation-wide index, whether he decides it needs no adjustment, or whether he ignores it, the single basis of his final conclusion is his considered but nevertheless subjective and general opinion of the comparative welfare of the producer. And since the pre-war period is in fact but a symbol in the folklore of agrarian reform, the first part of the declared policy is simply an admonition to improve the status of the producer. In practice, the illusory precision of Section 2(1) has, and can have, no other meaning.[10]

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[10]It was suggested to the Court in *Butler* v. *United States*, No. 401, October Term 1935, that section 2(1) impliedly directed the Secretary to use the National Index of Articles Bought. (See Brief for Petitioner, pp. 49-53.) The language of section 2(1), however, certainly does not warrant a construction binding the Secretary to use without adjustments statistics having the smallest tendency show the goal which section 2(1) directs him to achieve. Nor can it be argued that Congress ratified the procedure because it was used under previous acts. Congress has ratified past orders but it cannot be argued that in doing so

The occasion for the issuance of an order, however, is not even the formation of an opinion that farm prices are less than parity. The Secretary is ordered to act, not on the basis of existing conditions, but upon prophecy. An order is to issue when the Secretary finds it "*will tend* to effectuate" the declared policy, i.e., to achieve a parity of purchasing power. Such a "finding" does not call for the ascertainment of facts, but for an expression of hope as an economist. Amended Order No. 4 illustrates how much is left by the Secretary to chance, and by the Act to the Secretary's judgment.

In making the finding he had to foretell whether the cost of articles bought would rise or fall. It varies from year to year and from month to month (R. Vol. II, p. 211, par. 226). The national index in fact fell seven points in the five months following the issuance of the amended Order (R. Vol. II, p. 207, par. 215; Exh. 16, R. Vol. III, pp. 162-163).

The Secretary must also prophesy what effect his order will have on milk prices. Amended Order No. 4 fixed the Class I price, set out a formula for computing the Class II price in which the governing factor was the unregulated price of cream, and left the amount of surplus unregulated (R. Vol. II, p. 210, par. 222, 223). These three elements determine the return per hundredweight of milk produced (R. Vol. II, p. 209, par. 220). Since cream prices vary sharply, the Class II price fluctuates.[11] The

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Congress ratified for the future the method by which they were promulgated. This is true because no one knows nor did Congress know what procedure the Secretary followed in determining whether and how far to vary from the national index in calculating the price for each commodity. In short, Congress in the absence of an express declaration to the contrary ratifies action taken and not the method by which the Secretary decided to take it.

[11]During the administration of Amended Order No. 4 the Class II price varied from $1.905 per cwt. in December 1937 to $1.049 in June 1938 (R. Vol. III, pp. 118, 146).

percentage of surplus actually varies from year to year, sometimes substantially (R. Vol. II, p. 210, par. 225). Indeed, a class price increase may defeat its own end by causing an offsetting rise in the surplus, (R. Vol. II, p. 210, par. 224).[12] The Secretary, therefore, can only guess what the composite price will be.

The finding required by Section 8c(4) is the only guide expressed by the Act. Manifestly it is not a real limitation upon the exercise of the delegated power. Not only is the parity concept itself illusory. Obedience to the command to issue orders tending to achieve "parity" involves weighing too many variables to be done with precision. The formation of a judgment that a proper occasion for regulation exists, therefore, is only a decision that regulation would then be desirable. Power to make such decisions cannot be delegated. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388.[13]

The assumption upon which the previous discussion is based—that orders shall issue whenever the Secretary finds that they will tend to achieve parity—however, is false. Section 2(2) introduces into the declaration of policy a second element which increases the Secre-

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[12]The increase mentioned in paragraph 224 of the report occurred during a period of regulation by federal licenses and orders found to tend to achieve parity. R. Vol. II, p. 133, par. 94, p. 36, par. 7.

[13]Apparently the statute was drawn in the hope that *J. W. Hampton, Jr. & Co.* v. *United States,* 276 U. S. 394, would be considered a precedent. In that case, however, the President was directed to act upon the basis of an *existing* fact ascertainable from prices at which foreign and domestic goods were selling in this country. The cost of production formula was not shown to be indefinite in practice. Its application would be the easier because only knowledge of contemporaneous facts was necessary. Furthermore, the tariff is closely allied to foreign relations, and the Executive may properly exercise more power there than in other fields. *United States* v. *Curtiss-Wright Export Corp.,* 299 U. S. 304, 314-329. Without reference to the other vaguer parts of the declared policy, the case is distinguishable.

tary's freedom of action. Section 2(2) declares the added purpose to protect the interest of the consumer by raising prices for farm commodities "at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand". If the parity concept stood alone the Secretary would be required to issue orders when they directly or indirectly would establish a parity price. Taking the declared policy as a whole, however, he may issue or not issue orders accordingly as, in his mind, the interest of the farmer outweighs or is outweighed by the interest of the consumer. Of their relative weight he is always the sole judge. The declared policy gives no measure of either. It indicates that in the long run only the interest of the farmer may be the greater. Unlike Section 2(1), Section 2(2), moreover, on its face is a vague generalization having any meaning the reader might give it. The measures of the consumers' interest are "feasibility in view of current consumptive demand", and "the public interest".

But feasibility in view of the current consumptive demand means only that any regulatory scheme shall be practicable in the light of circumstances, and perhaps, that the prices resulting from it shall not be so high as to discourage consumption and defeat their own end. Such a statement does not establish an objective test to measure the desirability of regulating the handling of a commodity. At most it is an injunction to act wisely.

Similarly, the test of "the public interest" simply expands the ground in which the Secretary may use his discretion in deciding whether there shall be regulation or not. In some surroundings that phrase supplies a sufficiently definite test. Thus, it has been used frequently in railroad legislation which delegated powers to the Interstate Commerce Commission. See *Intermountain Rate Cases*, 234 U. S. 476, 486; *Avent* v. *United States*,

266 U. S. 127, 130. In those instances, however, other statutory provisions prescribe affirmative duties and positive prohibitions which narrow the field for administrative regulation and direct its course. Regulation of the transportation system has, moreover, an historical evolution which created symbols for definitive standards expressed in past practice and in comprehensive legislation. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24, 25. Another instance is the power of the Federal Radio Commission to grant licenses as "the public convenience, interest, or necessity requires". The test is definitive in that sphere, because the statute itself sets forth general criteria for the distribution of facilities, leaving to the Commission their application to the technical matters of frequency and interference. The subject matter of the field left open itself supplied narrow objective tests. *Federal Radio Comm.* v. *Nelson Bros. Bond & Mtg. Co.*, 289 U. S. 266, 279-285. In the field of agricultural regulation the dictates of the public interest are undefined. It lacks a background of gradual historical development. It is not narrow and technical. The questions it comprehends are not even limited to those arising between the consumer and the producer of milk. They extend to such problems of broader economic dislocation as may arise from increasing the proportion of consumers' expenditures for one product and thus bringing about an inevitable decrease in the proportion of consumers' expenditures for other products. The effect of raising farm prices upon the business of dealers and upon their retail price and wage policies would also have to be considered. In short, the injunction to regulate the handling of a commodity only when it is "in the public interest" gives power to the Secretary to regulate or not as his individual judgment of good policy may require.

The substantive sections delegate to the Secretary power to decide what shall be regulated, and when and where it shall be regulated. The declared policy does not set forth facts the existence of which shall be the occasion for regulation. It states what must be considered: the producers' interests, the consumers' interests and the public interest. Resolution of those interests is the genesis of every agrarian law. He who resolves them into action or inaction makes the law, even if the field for action is limited. Under this Act he would be the Secretary. The Act does not declare what on any occasion the law shall be. It declares who shall make it.

Even if the parity concept in Section 2(1) were definite, that would be true. At most it sets a goal to be reached by the path of regulation. Nothing in the declared policy indicates when the path is to be trod, when the journey is to be broken and when recommenced. Regulation when the Secretary deems it to be consistent with the consumers' interests, in the public interest and feasible, is regulation when the Secretary guided by his conception of good policy only, decides that it is a proper occasion for action. In short, Section 2 sets up no limitations, no facts to be ascertained, nothing but an individual's unguided judgment as the occasion for regulation. Delegation of the power to make that judgment is an unconstitutional transfer of the legislative power. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388.

B. Power to determine the manner of regulation is unlawfully delegated.

The Agricultural Marketing Agreement Act of 1937 does not prescribe even a basic program of regulation to be invoked when the Secretary finds that circumstances warrant regulation. The scheme of sections 8c(5) and 8c(7) is that the Secretary shall choose the manner in

which he will regulate the handling of milk. They list a large number of terms, all or part of which may, and one of which must, be included in a milk order. The Secretary may select and arrange them into radically different regulations.

Section 8c(4) is the only attempt to guide the Secretary's choice of a program. Under it an order shall issue if the order and all its terms will tend to effectuate the policy of the Act. We have already shown that the declared policy is not a sufficiently intelligible standard to confine the Secretary's action to matters of administration, that it is simply an admonition to form a legislative judgment and to act or not act accordingly. By the same token it is not an adequate criterion for the choice of a program.

Assume, however, that a parity of purchasing power is an intelligible end. Assume further that protection of the consumers' interests requires an ascertainable gradual rate of increase. The ultimate question is whether Congress has declared how the Secretary shall exercise the power delegated. If the only standard is broad or vague then the exercise of the power is unconfined and the delegation excessive. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *A. L. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495. In such cases the vital defect is not the indefiniteness of the standard but its inadequacy as a guide because it is indefinite. An irrelevant or indecisive standard, however precise, is equally inadequate because it is equally unconfining. That is the second great vice in Section 2. At best, it sets forth the goal and the gradual rate for its achievement without guiding the Secretary in choosing among the terms listed in Sections 8c(5) and 8c(7) of the Act.

Even a rough grouping of them will show that he has a choice between three basic programs for raising the prices

paid to producers. First, he may assist the producer to acquire higher prices by bargaining with handlers. Second, he may indirectly stabilize the resale price structure. It immediately affects farm prices. Third, he may directly fix in one of several ways prices payable by dealers for milk delivered. The Act permits variations in each scheme scarcely less fundamental than the scheme itself. It also permits but does not require any conceivable combination. In addition, the Act sets forth without preference alternative schemes of distributing among producers the total dollar value of milk. Each of the three programs is adaptable to raising prices. The same is true of their combinations. The choice, moreover, is not between subsidiary regulations. It is among fundamental controls.

The first line of endeavor might be to assist the producer in acquiring higher prices by strengthening his bargaining power and by eliminating dishonest dealer practices. The Secretary may accomplish this by four subsidiary measures. First he would supply producers with appropriate market information by setting up an agency to gather and disseminate it (sections 8c(5)(E), 8c(7)(C)). Producers do suffer in bargaining from lack of such information. *Federal Trade Comm. Summary Report in response to H. Cong. Res. 32,* 73d Cong., 2d. Sess., at p. 34.[14] Secondly, the actual amount received by producers could in fact be significantly increased on the average by policing the relations between producers and dealers with a view to prevent dishonest practices, including false weighing and testing, and to insure actual payment of the negotiated price (sections 8c(5)(E), 8c(7)(A)). *F.T.C. Rep.*, pp. 3-6. Thirdly the same line of endeavor might find expression in a modified price regulation which would require each dealer to pay the same

[14]Hereinafter cited as F.T.C. Rep.

basic price to all his producers (section 8c(5)(B)(i)). That would prevent local overbidding to entice producers away from other dealers. It might also tend to force large dealers meeting high local prices to raise their prices uniformly. Such statutes have been found useful. *Vt. Pub. Laws*, §§ 7722-23. Fourthly, the Secretary has power to prohibit unfair methods of competition and unfair trade practices (Section 8c(7)(A)). There is intelligent opinion that the tendency towards the concentration of distributing facilities may result in useful economies which would benefit the producers but that it also may put the producers at a disadvantage by concentrating the purchasing power in the hands of a few dealers. *F.T.C. Rep.*, p. 38; *N. Y. Legis Doc.* (1933) No. 114, p. 20. The Secretary under Section 8c(7)(A) could encourage the economies and at the same time eliminate the abuses. A program comprising all four elements would certainly "tend to effectuate" the declared policy.

The Secretary may, however, ignore that line of attack and concentrate on the resale price structure. Instead of policing the relations between dealer and producer he might regulate the relations between the dealer and his customers. Competition in fluid milk sales is exceptionally severe and has frequently produced sharp breaks in both resale and producer prices (R. Vol. II, pp. 98-100, par. 41-44). The Secretary has no power to fix resale prices but he does have power to outlaw most assaults on the price structure by prohibiting unfair competition and unfair trade practices (section 8c(7)(A)). Secret rebates, local price cutting to crush competition, special discounts, and discriminations are largely responsible for the instability of the resale price structure. *F.T.C. Rep.*, p. 39; *N. Y. Legis Doc.* (1933) No. 114, p. 15; J. D. Black, *The Dairy Industry and the A. A. A.*, The Brookings Institution (1935), p. 233. Such unfair practices on

the part of a few dealers, as in many industries, force the others openly to lower their resale prices in order to retain their customers. The prohibition of those practices would mitigate if not eliminate many resale price wars. The producers would surely profit. R. Vol. II, pp. 98-100, par. 41-44. *Nebbia* v. *New York*, 291 U. S. 502. Not only that, there is reason to believe that substantial savings from the elimination of waste and destruction would be passed back to producers. *N. Y. Legis Doc.* (1933), No. 114, p. 263.[15]

The third possible program is the fixing of prices to producers. Within it choices are possible. For example, the Secretary has power to fix a flat minimum price which all handlers must pay (section 8c(5)(B)(ii)). Probably that plan would be useful only to eliminate the lowest prices. A higher minimum flat price would force out of business dealers with high percentages of surplus. But it might be adopted. Such a plan has been in effect in the Boston milkshed (R. Vol. II, p. 123, 124, par. 78); and it would scarcely be arbitrary or capricious to think that in the long run it might aid the producers. The more likely scheme of price regulation, however, would be the fixing of class prices (section 8c(5)(A)). It in itself involves a choice, for the Secretary may or may not apportion the proceeds among producers on the basis of individual ratings (section 8c(5)(B)(d)).[16] The base rating plan not only affects the individual producer's return per unit by limiting the milk included in a dealer or market-wide pool

[15]It is not strictly speaking possible for the Secretary to issue an order simply regulating trade practices. One term from section 8c(5) must be included. If, however, the Secretary honestly believed that to be the best program, he could legally and conscientiously follow the Act by inserting an innocuous term requiring security for producer payments.

[16]Under original Order No. 4 the base rating plan was enforced. R. Vol. II, p. 25. It was deleted by the amendments. R. Vol. II, p. 48.

but it also is calculated to even out production over the year to minimize heavy seasonal surplus. The Secretary's choice in this matter has vital importance because the surplus is the greatest problem in the industry. See *Nebbia* v. *New York*, 291 U. S. 502.

Between these three fundamental programs and the four possible combinations thereof, the Secretary has practically unlimited power of choice. The broad provisions of sections 8c(5) and 8c(7) are sufficiently general to be adapted to local conditions in any market.[17] Each is suited to achieving the gradual rise in the purchasing power of milk which is said to be required by the policy of the Act.[18] The inadequacy of the only standard established by the Act is accentuated in the opportunity for choice of one of the possible combinations of the three programs because price fixing alone could always accomplish the desired gradual increase. Necessarily, therefore, the Secretary's selection will depend upon *his* views of the relative desirability of the alternatives, not from the viewpoint of their effectiveness in raising prices but from the viewpoint of their desirability in other respects.

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[17]The organization and structure as well as the problems of all the milksheds and markets are basically the same. See *F.T.C. Rep. passim;* J. D. Black, *The Dairy Industry and the A. A. A.*, The Brookings Institution (1935), ch. II. Comparison of the pertinent parts of the Master's Report (R. Vol. II, pp. 90-137), and of the Pitcher Committee report (*N. Y. Legis Doc.* (1933) No. 114; see *Nebbia* v. *New York*, 291 U. S. 502), illustrates the essential similarity in greater detail.

[18]The fact that in most milk orders the Secretary has fixed prices should not obscure the fact that the other fundamental programs are equally open and capable of development. Indeed, at least one line of economic thought holds the true function of marketing agreements and orders is to regulate trade practices and to encourage cooperative producer solution of the problems. Price fixing by the Secretary under this Act has been thought to be a sacrifice of the gradual sound increase sought by the declared policy to the immediate demands of influential groups. See Nourse, et al., *Three Years of the A. A. A.*, The Brookings Institution (1937), p. 498.

Plainly, the choice of a fundamental program and the issuance of orders according to that choice, is no mere rubbling of chinks in the legislative structure. *See Wayman* v. *Southard*, 10 Wheat. 1, 43. Congress may legislate so far as practicable, and, having selected a legislative program, undoubtedly may delegate the duty of regulating the minutiae according to the program. *Buttfield* v. *Stranahan*, 192 U. S. 470. Examples of such legislation are the statutes delegating power to fix grades and standards for classifying commodities. *Buttfield* v. *Stranahan, supra; Red "C" Oil Co.* v. *North Carolina*, 222 U. S. 380, 394; *Currin* v. *Wallace*, No. 275, October Term, 1938. Cf. *St. Louis, I. M. & S. Ry.* v. *Taylor*, 210 U. S. 281, 287. In such cases, the very narrow nature of the subject matter limits the manner of the exercise of the delegated power. The questions left to the administrator's decision are questions not of governmental policy, but of mechanical application. Cf. *Federal Radio Comm.* v. *Nelson Bros.*, 289 U. S. 266, 279.

Nor is the delegation here sustained by analogy to statutes directing the executive branch to invoke specific regulations upon its ascertainment of certain facts. *Field* v. *Clark*, 143 U. S. 649; *J. W. Hampton, Jr. & Co.* v. *United States*, 276 U. S. 394; *Mulford* v. *Smith*, No. 505, October Term 1938, decided April 17, 1939. The Marketing Agreement Act leaves the Secretary to choose a form of regulation; it specifies no facts on which the choice shall depend. The best examples of the principle expounded in *Field* v. *Clark, supra*, may be found in cases sustaining the power of Congress to establish a general rule and to delegate the duty to adapt and apply it by administrative regulations to the facts revealed in particular instances. *United States* v. *Grimaud*, 220 U. S. 506, 517, *Mahler* v. *Eby*, 264 U. S. 32; *United States* v. *Chemical Foundation*, 272 U. S. 1, 12. For example, where Congress has declared that

navigable streams shall not be obstructed, there remains only the power to consider the traffic on the stream and the manner in which a particular proposed structure would affect it. *Union Bridge Company* v. *United States*, 204 U. S. 364, 388. *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177, 193. Under the present Act, however, the Secretary does not make local regulations only. He does that, but first he chooses a basic system of control from a number of plans applicable to every market.

One choice heretofore unmentioned illustrates the contrast between the administrative decisions made under those statutes and the legislative decisions which the Secretary makes under this Act without guidance from the declared policy. If the Secretary determines that he will raise the purchasing power of milk by fixing use class prices then it is necessary for him to establish either dealer pools or a marketwide pool. Section 8c(5)(B) empowers him to choose either. The declaration of policy does not guide the choice. The policy is directed only to the purchasing power of commodities. The alternative equalization devices have to do only with the distribution of that purchasing power. This is easily shown.

Under both dealer and marketwide equalization the price to be paid out by the dealers for milk put to each use is fixed without regard to which one of the necessary pooling devices is to accompany it (R. Vol. II, p. 122, par. 74). The class prices therefore determine the dollar value of milk, which is as far as the Secretary can go towards regulating its purchasing power. Under both plans of equalization, the sales of each dealer in each use classification are multiplied by the price fixed for that class. Under each plan the product is his total financial contribution and the sum of the products for each dealer is the measure of the purchasing power of the commodity. Where the money goes is a different question. If dealer

pools are operated each dealer pays to his producers a unit price calculated by dividing his total purchases from them into his total financial obligation. Since the percentage of surplus among dealers varies, the composite price to groups of producers will vary. Under marketwide equalization, however, the total purchasing power of the milk is distributed evenly among all producers. The price per unit received by each producer is calculated by dividing the total purchasing power of all the milk in the market by the total number of units sold so that each producer will receive a uniform sum.

Consequently, the choice of dealer pools or marketwide equalization is not even between means of increasing the dollar value or purchasing power of milk. Under each plan the average value of an hundredweight of milk in the market is the same. Both plans are only means of distributing the dollar value which measures the purchasing power of the milk.[19] In the absence of fixed class prices doubtless the choice between them may be vital to the industry or to orderly marketing conditions. But the declared policy says nothing of those considerations ex-

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[19]Both House and Senate Committees described the provisions in that way and recognized that they did not affect the purchasing power of the commodity: "Alternative methods of distributing the total dollar value of all milk sold in the market among producers supplying the market are provided." *H. Rep. No.* 1241, 74th Cong. 1st Sess., p. 10; *Sen. Rep. No.* 1011, 74th Cong. 1st Sess., p. 10. The Secretary in issuing Order No. 4 made the same distinction, finding (R. Vol. II, p. 13):

> "3. That . . . the prices established in this order will . . . tend to give milk a purchasing power . . .
>
> "4. That the determination of uniform prices to producers and the payment of such prices through a marketwide equalization pool . . . is a fair and reasonable method of distributing to producers the proceeds of sales to handlers. . . ."

He made precisely similar findings when he issued the amendments to Order No. 4 (R. Vol. II, p. 48). See also Black, *op. cit supra*, p. 292 ff.

cept as they affect prices. And, the choice cannot affect the class prices to farmers where by an order the prices are fixed. The choice of marketwide equalization might add incentive to production by marginal farmers and ensure an adequate supply, but the declared policy is concerned only with the consumers' interest that prices be not raised too rapidly. These subsidiary questions and others like them make up the broad issue, whether it is politic to equalize the purchasing power of producers in order to raise the purchasing power of some at the expense of others. The declared policy speaks only of the purchasing power of commodities. There is a sharp difference between the two (R. Vol. III, p. 166). Indeed, a certain indication of the limitations of the declared policy in this respect is the fact that it seeks only to duplicate conditions in a period when there were class prices and dealer pools with inevitable differences in the sums received by producers. Therefore, the Secretary's choice must be based upon his unguided judgment upon the policy of equalization among all producers.

There can be no doubt that the power to impose or not impose marketwide equalization is a legislative power. The very real question of its constitutional validity shows how deep it cuts. (See *Infra* pp. 64-83.) If exactions are to be levied on handlers and the prospect of receiving in the future the profits received in the past is to be taken from producers, both for the benefit of their competitors, then Congress should do it. That degree of control is certainly not traditionally an administrative power to be exercised as it is here exercised, according to the administrator's individual and unlimited judgment. The two forms of control are inconsistent. One or the other is a necessary adjunct to fixing use class prices. But the absolute power to choose one or the other is certainly as broad as the unlimited power to invoke or not invoke a

defined regulation. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388.[20]

The decision the Secretary must make upon that question, however, is but one among the similar decisions he makes in selecting one of the seven programs above described, all of which are equally available and equally adaptable to local conditions.[21] The questions to be resolved by those decisions also raise fundamental issues of industrial control and social policy: Whether direct price-fixing is desirable or the resulting rigidity outweighs the difficulties of indirectly aiding producers to secure price increases. Whether the producer prices should be raised by checking monopolistic tendencies or whether the dairying industry would profit by the stability of large units whose policies were regulated. Whether it is more politic to increase prices by eliminating practices which unfairly reduce resale prices or to concentrate directly on farm prices. There is marked contrast between the power to decide those questions—which is legislative—and the power exercised in executing a program—which is administrative. Since the declared policy gives no clue to their proper resolution, the Secretary is left to exercise legislative power.

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[20]For two reasons it cannot be contended that the requirement in section 8c(5)(B)(i) of assent by three-fourths of the producers to dealer pools prevents there being an unconstitutional delegation of power. First, if the Secretary does not exercise his own judgment, then the producers, guided only by their interest, make the law. This would be a denial of due process. *Eubank* v. *Richmond*, 226 U. S. 137, 143; *Seattle Trust Co.* v. *Roberge*, 278 U. S. 116, 121-122; see *Highland Farms* v. *Agnew*, 300 U. S. 608, 614. Second, the essential question is not how regulation is made but whether the Congress has exercised its constitutional function. If it has not, the delegation is unconstitutional without regard to who else exercises the power. *A. L. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 536-538.

[21]See footnote 17, *supra* p. 53.

C. THE PLENARY POWER TO REGULATE THE DAIRYING INDUSTRY IS UNLAWFULLY DELEGATED.

Analysis of the power delegated to the Secretary into his power to choose a time for regulation and his power to choose the mode of regulation is helpful to determine the constitutionality of the Act. Authority to exercise uncontrolled power in either respect, would be excessive. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; *A. L. Schechter Poultry Corp.* v. *United States,* 295 U. S. 495. The ultimate question, however, is whether, taking his authority to impose legal obligations as a whole, his function under the Act is that of an administrator or of a legislator.

The dairying industry has a sufficient public importance to warrant regulation as a public utility, both because large sections of the country depend upon it for their livelihood (R. Vol. II, pp. 90-95; *Nebbia* v. *New York,* 291 U. S. 502), and because the public requires milk as an important article in its diet (R. Vol. II, p. 88). The states have power to regulate the industry for the benefit of both interests in the absence of federal regulation. *Milk Control Board of Pennsylvania* v. *Eisenberg Farm Products,* No. 426, October Term, 1938; *Nebbia* v. *New York, supra.* It may be assumed that it is also both a proper and a desirable field for federal regulation.

By the Agricultural Marketing Agreement Act of 1937 Congress turned the industry over to the Secretary with an injunction to consider immediately the interest of the farmers in an increase in the purchasing power of their produce, the interest of the consumers in low prices, and the feasibility and effect on "the public interest" of his program. The declared policy also indicates a Congressional belief that over a period of years the purchasing power of farm products should be increased. Even if the parity concept could be applied in practice, that

would be the substantial intendment of the declared policy.[22]

In addition to stating what to emphasize in the long run in regulating the industry, the Congress undeniably limited somewhat the manner in which it could lawfully be regulated. Shipment of milk from one area into another cannot be prohibited by the Secretary (section 8c(5)(G)). He has been given no power directly to set a maximum or minimum resale price. Nor may he prohibit production, although he may indirectly regulate it by base ratings which would cause farmers to receive less for milk marketed in excess of their bases (see R. Vol. II, pp. 9-30). With these exceptions, however, the Secretary has been given power to regulate the industry in each area in any way or every way which he alone judges desirable and likely to raise prices to producers. Or, if he believes prices will tend to rise with the price level of other commodities, he need not regulate at all.

Under the present Act, therefore, the Secretary has absolute control over substantially all of an industry and only a long run general purpose to achieve. The scope of his power exceeds the power exercised by the President over the transportation of oil produced in excess of state allotments. See *Panama Refining Co.* v. *Ryan*, 293 U. S. 388. There, the purpose was to improve conditions in an industry. The means was not a matter of choice. Here, the purpose is the same except that one of the three interests—the farmer, the consumer, the public—must eventually be favored. And the means is left open for the Secretary's choice. The present case more closely resembles *A. L. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495. There, it is true, each of many industries was to be regulated for the purpose of improving economic conditions. The means to that end were unde-

[22]See footnote 6, *supra* p. 40.

fined and broader than the means available under this Act. But the principle is the same. This Act, like that one, "does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure". *Ibid* at p. 541. The only "finding" required in this Act is similar to that one—that the proposed regulation "will tend to effectuate the declared policy of this title". *Ibid* at p. 538. The declared policies are differently worded; but, if they are applied to their appropriate sets of facts, the only substantial difference is that the policy of this Act states the elements comprising the public interest in farming and gives one element more emphasis than the others. In each case the finding is essentially an expression of opinion that a proposed regulation will tend to promote welfare of an industry.

The doctrine of the separation of powers does not deny to the government "the necessary resources of flexibility and practicability". *A. L. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 530; cf. *Buttfield* v. *Stranahan*, 192 U. S. 470, 496. But here Congress has done more than delegate the duty to regulate details. More adequate and specific legislation was practicable. Congress might have directed the Secretary to regulate milk prices according to a certain plan, to assist the producers in efficiently marketing their milk, and to eliminate unfair methods of competition. It might have told him to do some of them. It could have decided that there should or should not be market-wide equalization. In short, Congress could and should have selected a program. The problems of the industry are uniform. The markets are suited to a single form of regulation.[22] For example, market-wide equalization could be enforced everywhere with similar results, although it may be thought more

[22]See *supra* p. 53, footnote 17.

necessary in one area than in another. The need for regulation to effectuate the declared policy, if it exists, exists everywhere. Prices in the Boston area have been representative of prices throughout the country (R. Vol. II, p. 110, par. 48). The need for local adjustments lies not in the program. Different prices would have to be fixed in different markets. Base ratings might be assigned differently. Location, freight and quality differentials should be adjusted to local conditions. But establishment of one of the three programs from which the Secretary may choose or of a combination of all of them would leave ample room for local adaptations.

Legislation in the field of transportation shows how that might have been done in spite of the complex problems. The Interstate Commerce Commission Act and its amendments, the Transportation Act and its amendments, exemplify a comprehensive statutory structure for administrative regulation according to a policy embodied in the legislation. The intelligible standards established by the broad prohibitions and regulations of those statutes coloured the general words used to prescribe administrative action in particular circumstances, and so limited the delegated power. *Intermountain Rate Cases*, 234 U. S. 476, 486; *Avent* v. *United States*, 266 U. S. 127, 130; *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24, 25.

Recent legislation discloses the practical possibility of constitutional regulation by Congress in the field of agriculture rather than forbidden delegation of law-making powers to the Secretary. The Agricultural Adjustment Act of 1938, in respect to tobacco, establishes one program for regulating commerce and aiding the farmer—the discouragement of over-production. Regulation must be invoked on the occurrence of a specified and existing fact—an excess of available supply over the reserve sup-

ply level. Allotment of quotas must be made, and made on the basis of past marketings. The Secretary, therefore, makes no legislative choices. He exercises only the proper administrative function of finding the facts and applying the dictates of the statute to them. See *Mulford v. Smith*, No. 505, October Term, 1938, decided April 17, 1939.

Comparison of those statutes with this Act condemns by contrast, rather than upholds it by analogy. There, Congress outlined a comprehensive program to be administered. Here, it delegated power to choose the policy. There, Congress decided that rates and quotas should be fixed and commanded performance. Here, it gave power at the will of the Secretary to fix prices. In the field of transportation Congress decided that inter-carrier payments should be made to equalize carriers' income so as to provide uniform facilities to shippers. With reference to tobacco, Congress concluded that marketings should be reduced proportionately by all growers from their past marketings. In respect to dairying, however, the Secretary alone will decide whether to enforce inter-handler payments to equalize their payments for milk so that all producers may obtain uniform returns at the cost of some. Those and like questions of policy are the heart of legislation. They were decided in the one field by Congress. They could more easily and should have been decided by Congress in the other.

The decision of such questions or failure to decide them is the difference between creating legal obligations, which is making the law, and prescribing the mode of compliance with statutory obligations which is execution of the law. The former comprehends, first, selection of an ultimate objective from a welter often antagonistic demands, second, determination of the appropriate occasion for sacrificing conflicting yet desirable ends to

the ultimate objective, and, third, choice of that program for attaining the objective which is most consistent with the law-maker's view of "the public interest". By the Agricultural Marketing Agreement Act of 1937, Congress performed the first of the law-maker's three functions. It fixed the ultimate goal, improvement of farm conditions. Beyond that point the Act is organic only, transferring the power to fix policies and then to formulate a definitive program for achieving them. The Secretary's duty even is legislative, the duty to consider the chief conflicting interests—those of the farmer in high and the consumer in low prices—and to resolve them into some program according to his view of practicability, "feasibility", and his synthesis of all antagonistic demands, "the public interest". That duty and the correlative power has been placed in Congress beyond removal by it. Those questions, which are the heart of law-making and whose resolution is the genesis of a statute, must be resolved by the Congress under the present system of constitutional government. *Wayman* v. *Southard*, 10 Wheat. 1, 43; *Field* v. *Clark*, 143 U. S. 649; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *Currin* v. *Wallace*, No. 275, October Term, 1938.

II.

THE EQUALIZATION PROVISIONS OF THE AMENDED ORDER VIOLATE THE PROVISIONS OF THE FIFTH AMENDMENT TO THE CONSTITUTION.

The Act, as applied in the amended Order, has two distinct aims and effects. First, it establishes prices to be paid to producers for milk; second, it provides a method of equalizing among all producers in the milk shed, through a marketwide pool, the benefit of all fluid

milk sales in the entire market. By Articles II and III of the amended Order, milk is classified in accordance with the handler's use and minimum prices are fixed for each of the two classes. These prices, the Secretary found, are reasonable and will, over a period of time, tend to give milk a purchasing power equivalent to its purchasing power in the base period (R. Vol. II, p. 48). By such increased prices the return to milk producers in the aggregate is raised, and the economic condition of the group as a whole bettered. Then, having raised the general level of prices, the amended Order undertakes to better the condition of individual members of the group by allocating the proceeds of all sales of milk in the market among such producers by what the Secretary has found is "a fair and reasonable method" (R. Vol. II, p. 48). This is achieved through marketwide equalization. The mechanism by which it is carried out we have already discussed in our description of the provisions of the amended Order (*supra*, p. 17).

In so far as the amended Order simply fixes prices, we do not challenge its constitutionality. We shall assume that the premise on which the Act is based, that the purchasing power of agricultural commodities has been so seriously impaired as to result in disorderly marketing conditions and threaten the flow of commerce in such commodities, is sufficient justification for the fixing by Congress of minimum prices to be paid such producers for sales in interstate commerce. See *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 319, 326. Cf. *Nebbia* v. *New York*, 291 U. S. 502. We shall also assume that the price level of milk in the Boston market has been so low as to warrant the fixing of minimum prices to be paid for milk by handlers in this area. Nor do we contend that the actual minimum prices established by the amended Order are unreasonably high or confiscatory.

But the vice in the amended Order, affecting both the petitioning handlers and the producers who sell to them, is its effort not merely to establish minimum prices, but to equalize among all producers in the milkshed the receipts from the valuable market outlets possessed by some. The goal sought is to pro-rate the fluid milk market among all milk producers. We contend that this attempted redistribution of purchasing power transcends the limitations imposed upon Congress by the Fifth Amendment. It cannot be sustained as being simply a reasonable method of protecting interstate commerce in milk by increasing the purchasing power of milk producers or preventing disorderly marketing conditions. Its aim and effect are to take the valuable markets of one group of handlers and producers for the sole benefit of their competitors.

A. THE EFFECT OF THE EQUALIZATION SCHEME UPON THE PRODUCER AND THE HANDLER.

The avowed purpose of the equalization provisions of the amended Order is to give all producers a pro rata share in the proceeds of all sales of fluid milk in the market. But the increased share which some producers thereby realize can be achieved only at the expense of other producers. The demand for fluid milk is relatively constant (R. Vol. II, 94). The market for such milk is thus a limited one. Economically it is impossible to increase the share in that market to one group of producers without thereby decreasing the share which others already hold. Of course, it might be urged that even with a decreased share in the fluid milk market, a producer might receive the same number of dollars which he would have received in the absence of the equalization scheme. The suggestion rests on the assumption that it is possible

to raise prices sufficiently to offset the loss resulting from a diversion of a portion of the producer's fluid milk market to others. But there is both a legal and an economic level beyond which minimum prices cannot be raised. The Act (Section 2) forbids the raising of prices above the parity level. And, economically, there is a point beyond which increased prices of milk cannot be borne by any handler. The suggestion, however plausible theoretically, proves unsound in practice. Take, for example, the intervener, E. Frank Branon, petitioner in case No. 865, who has sold milk to the petitioner Hood for more than twenty-five years. The effect upon him of the operation of the equalization scheme was to reduce his net return from the sale of milk, despite the increased minimum rates set up in the amended Order.[24]

The suggestion in the opinion below that the amended Order takes nothing from such a producer because "the blended price is but a minimum that the handler must pay to the producer, and there is nothing in the Act or the Order that prohibits the defendants from paying the higher price to the intervenors" (R. Vol. I, 130) is economically unrealistic. The whole object of equalization is to level out the existing differences between producers selling to dealers with a high percentage of fluid sales and producers not having such outlets. Its very premise is that all farmers should receive the same return for the same quality of milk sold. And, as a matter of economics, it is perfectly plain that it will have that effect. True,

[24]During the month of August, 1937, when the equalization pool included substantially all handlers (R. Vol. II, pp. 163, 164 and pp. 190, 191), the blended price payable to a non-member producer in the 200 mile zone averaged $2.092 per cwt. (R. Vol. III, p. 227). Corresponding prices posted and paid by Hood during the preceding seven months, when adjusted for normal seasonal variation from the August price, averaged $2.275 per cwt. The difference is $.183 per cwt. See Appendix A, *infra*, p. 126.

the producer is legally free to ask the handler to pay not only the blended price but also an additional amount equivalent to the payment into the equalization pool, and the handler is legally free to do so. But it cannot seriously be supposed that the producer could possibly induce, or the handler take, such action. The amended Order has fixed prices for each class of milk which the Secretary has found are reasonable (R. Vol. II, 48). To assume that the handler can pay to his own producers in addition to reasonable prices further sums equal to the payments he makes to the pool is economically unreal. In the case of the petitioner Hood, for instance, the amount of its equalization charges for the period between August 1 and December 31, 1937, was $336,891.46 (R. Vol. II, 218). It can scarcely be supposed that any handler could readily pay that sum, or any substantial portion of it, twice—to the pool and also to its producers. And to assume that producers could induce such payments in excess of prices found to be reasonable is absurd. The Act and the amended Order are predicated upon the assumption that, without the aid of government intervention, the producer does not obtain even a fair price for his milk. Can it be supposed that when the price is increased the individual producer will be able to require the handler to assume not only the increased burd n but more than that? On the contrary, as the master has found, because of economic conditions the tendency of handlers will be to pay no more than the blended price computed by the Administrator (R. Vol. II, 136).[23] The theoretical possibility that a producer may escape the effect of the equalization provisions by demanding and receiving payment in excess of the blended price is a ghost

[23] Cf. *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163, 169: "What is fixed is a minimum only. None the less, competition among dealers is so keen that in practice the legal minimum is the maximum that the appellant is able to charge."

elusive to the grasp. We cannot close our eyes to the plain fact that the operation of the equalization scheme was intended to and does take from some producers the benefit of a market they now have.

But the scheme has also a significant effect upon the handler. A handler having more than the market average of fluid milk sales must in each delivery period make a payment into the equalization pool. That payment is used directly for the purpose of reimbursing his competitors who, although they had less than the market average of such sales, have paid the blended price. To prevent what the Court below termed "slow death to those handlers who buy at the blended price and are forced to sell great portions of their commodity at the Class II prices" (R. Vol. I, 122), equalization payments are exacted. Thus one group of handlers is required to pay to keep a competing group alive. It is true, as the Court below observed, that handlers who have had the advantage of disposing of the bulk of their milk at Class I prices "have no lien or property right in this preferred market. They cannot corner it and hold it against the power of Congress . . ." (R. Vol. I, 122). But the question is not whether they are entitled to hold their market free from competition, but whether they shall be required to subsidize their competitors.

It was suggested by the government in the Court below that since the handler's total financial obligation is measured by his own sales at the Class I and Class II rates, and since those rates are reasonable, it is a matter of indifference whether he is required to discharge that obligation by paying the whole sum to his producers or by paying part to them and the balance to the pool. He is deprived of no property, it is said, since he must in any event pay the same total amount. But plainly this suggestion is fallacious. Handlers with a high per-

centage of fluid milk sales have always tended to draw producers to them because they have been able to pay a higher net return. (R. Vol. II, 98). They have been in a position to impose more stringent requirements as to the quality of milk production. It is certainly a matter of consequence to them whether they can maintain the same supply by passing on to their own producers the benefits of their fluid milk market or are required to utilize a portion of those benefits to foster competition against themselves. For the effect of the equalization scheme is not merely to diminish their ability to pay as high a price to their own producers, but to better the economic position of their competitors. Competing handlers are assured that, however small their own sales of fluid milk, their producers will get as high a return as any others. The marginal dealer is thus encouraged and enabled to remain in business. He can obtain the same supply of the same milk at the same prices as well established dealers, compel them to bear part of the cost, and compete with them for the fluid milk market. In this way handlers with well established fluid milk outlets are required to furnish their less successful competitors with the means of winning the market in fluid milk. The situation is much the same as if under a minimum wage law an employer's total financial obligation was measured by his profits; the employer having more than the average amount of profits being obliged to pay a minimum wage to his own employees and an additional amount to his competitors to reimburse them for their increased labor cost.

B. THE TAKING OF THE FLUID MILK OUTLETS OF PRODUCERS AND LEVYING EXACTIONS UPON HANDLERS FOR THE BENEFIT OF COMPETITORS IN THE MARKET IS A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS.

The applicable principles are well settled. In the exercise of its power to regulate interstate commerce, Congress is, of course, bound by the limitation imposed by the Fifth Amendment that it may not take the property of one person for the purpose of conferring a benefit upon another. *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330. No matter how great the needs of the beneficiaries to whom such property is transferred, or how gravely the nation may be interested in their welfare, the Fifth Amendment commands that the property of one individual shall not be transferred to relieve another individual's necessities. *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 602.

The very principle upon which the equalization scheme rests, that those having valuable markets should be required to surrender them to their rivals so that all may have an equal share of the business, has been already decisively condemned by this Court. In *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, a gas proration order, designed to compel the gas producer with valuable market outlets to share such outlets with other producers who had none, was held invalid as a "glaring instance of the taking of one man's property and giving it to another". The mechanism there used was to reduce the allowable production of gas to a point insufficient to meet the contract requirements of producers having facilities for reaching the market so that they were required to buy gas from others having no such facilities. Although here no producer and no handler is required to buy surplus milk from his competitor, each is required, through pooling the receipts of all sales, to contribute part of

the value of his product to his rivals and thus afford the benefits of the market he has to others "who have not contributed in money, services, negotiations, skill, forethought or otherwise to the development of such markets" (*Ibid*, 78). "There is a difference in the means employed; but the difference is not of legal significance" (*Ibid*, at 79).

Moreover, like the proration scheme in that case, the equalization provisions operate solely against one group of handlers and producers to the benefit of another. As the record demonstrates, the handlers who at present have the principal fluid outlets and are thus obligated to make equalization payments, are so-called "proprietary" handlers.[26] Competing with these handlers in the distribution and sale of milk are numerous cooperative associations (R. Vol. II, 112-115). It was through their votes in the referendum that the amended Order received requisite producer approval (R. Vol. II, 199). These cooperatives presently carry a large percentage of surplus milk. They are thus the chief beneficiaries of the equalization scheme to date.[27] And, under the provisions

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[26]All the defendants considered in the Master's report are private corporations or individuals, not cooperative associations. (See description of the several defendants, R. Vol. II, 212, 226, 237, 240, 243, 246, 253, 255, 257, 260, 263.)

[27]Below are tabulated the respective percentages of Class I and Class II milk handled during the delivery periods from August through December, 1937, by (a) the three major cooperatives, (b) the petitioner Hood, and (c) all handlers in the market:

	Class I	*Class II*
Three cooperatives	39.84%	60.16%
Hood	83.76%	16.24%
All handlers	62.84%	37.16%

These percentages were computed from sources in the Record as follows: (a) Three cooperatives, R. Vol. II, p. 117; (b) Hood, R. Vol. II, p. 214; (c) all handlers, R. Vol. II, p. 190. It is plain, therefore, that the three major cooperatives carried the principal burden of surplus milk in the market. They were accordingly

of the Act, they will remain so. Not only will they be able to draw from the pool so long as the balance of fluid milk sales in the market is against them, but if the balance shifts, they are under no duty to make a corresponding return. For by the terms of the Act, a cooperative association cannot be compelled to make equalization payments. Any such liability which the Amended Order may seek to impose upon it is invalid and cannot be enforced. This we have demonstrated fully elsewhere. (Appendix B, p. 127, *infra*.) Thus proprietary handlers who have fluid milk outlets must always pay without possibility of receiving a correlative return. They are in the same position as the owners of pipe line facilities in the *Thompson* case who were required to surrender a part of their markets to others without compensatory benefits.

Attempt is made, however, to justify the present scheme on the ground that the equalization provisions are a reasonable regulation in the public interest. It is said that, to prevent destructive price-cutting and disorderly marketing conditions, it is necessary to require all producers and handlers to bear a share of the burden of the surplus and so enable all producers to have a share in the fluid milk market; that the method of distributing the burden and the benefit is reasonable and not arbitrary; and that the resulting benefit to private individuals is but an incidental result of regulation in the public interest. We submit that this justification is not made out.

Unquestionably the existence of a surplus of any commodity tends to induce sharp competition among producers of that commodity and in the absence of regula-

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the chief persons entitled to withdraw from the equalization pool. See, for example, the amounts credited to New England Dairies, Inc. and Milton Cooperative Dairy Corporation for the August delivery period (R. Vol. II, p. 192, par. 185).

tion may result in a general lowering of the price level of that commodity. In that sense a surplus of fluid milk, of course, creates a problem. Such was the conclusion of the joint legislative committee of the State of New York[28] investigating the milk industry which is referred to by this Court in *Nebbia* v. *New York*, 291 U. S. 502, 516-518. Summarizing the conclusion of that committee, the Court said: "So long as the burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor. The fact that the larger distributors find it necessary to carry large quantities of surplus milk, while the smaller distributors do not, leads to price-cutting, and other forms of destructive competition." (*Ibid.* at 518). The problem created by the surplus is thus the possibility of demoralized markets and ruin of the dairy industry through price-cutting. The evil is not the unequal distribution of the surplus as such, but the demoralization that results therefrom when there is no regulation of prices. Faced with such demoralization, the legislature may, as this Court held in the *Nebbia* case, take appropriate action to prevent it. There, the remedy tried was the fixing of retail prices. Here, it is the fixing of prices to be paid directly to producers. But the question then arises whether, *after* such prices are fixed, the surplus furnishes a justifiable occasion for the adoption of the scheme here attempted of redistributing purchasing power among individual producers. Once prices are fixed by the government and demoralization of the price structure thus prevented, the destructive competition originally caused by the surplus is eliminated. The possible objection that, in the absence of equalization, the whole structure of prices thus established will fall is unsupported by facts or reason. Because, under a classified price system, producers without

[28]See Report of Joint Legislative Committee To Investigate the Milk Industry, N. Y. Legislative Document (1933) No. 114.

established fluid milk outlets tend to cut prices *when there is no governmental regulation of price,* scarcely tends to show that once prices are established by law, illegal price cutting will be widespread. We have no experience to teach us that such violation of law by producers and handlers alike would necessarily or even probably result. Such a conclusion is based purely on conjecture. It is predicated on widespread disobedience of law and inability by the government to enforce specific mandates of Congress. But surely such a complete breakdown of law enforcement cannot be presumed. Nor can it well be argued that handlers with a large supply of surplus milk will be able to cut the resale prices at which fluid milk is sold, thus causing retaliatory price cutting by other handlers and leading to a general collapse of the price structure (R. Vol. II, p. 98, par. 41). For in the Greater Boston Marketing Area there is now, and has been since the amended Order became effective, a complete regulation by the State of retail sales of fluid milk and cream (R. Vol. II, p. 136, par. 101; Vol. III, pp. 76-90). This regulation, similar in substance to that adopted in New York and upheld in the *Nebbia* case, effectively establishes the level below which resale prices cannot fall.

The very premise on which the Act rests is that the price structure and marketing conditions during either the pre-war period from 1909 to 1914, or the post-war period from 1919 to 1929, were normal. If similar conditions and prices can be restored, the presumption of the Act is that the purchasing power of agriculture will be sufficient to prevent demoralization of commerce in milk. Yet in neither of those periods was there any market-wide equalization in the Boston market, or, so far as appears, in any market. The problem of surplus milk, however, then existed to as great a degree as at present. A consideration of the percentage of surplus carried by the

cooperative controlling 60 per cent of the milk in the entire Boston market (R. Vol. II, 211) shows that the average yearly surplus during the post-war period from 1919-1929 was 41.5 per cent, during the period from 1930-1936 was 40.4 per cent, and during the period from 1933-1936, 43.5 per cent. The amount of surplus in the entire market has therefore remained relatively constant, although there has been a slight increase since 1933 when federal regulation was first initiated.[29] There is no evidence in the record tending to show that the surplus is any differently or more inequitably distributed among producers and dealers at present than it was during the base period, or that it will have any evil consequences now that it did not have then. The Act contains no recitals to that effect; the Secretary has made no such finding; and the evidence before the Secretary at the hearings on the proposed orders (Vol. II, p. 43, par. 12, Appendix B thereto, not printed but certified to this Court as an original exhibit) is barren of any such suggestion. It is, therefore, fair to say that no greater or different problems with respect to distribution of surplus now exist than during the base periods when presumptively the existing method of distributing that surplus was not so abnormal as to disturb the free flow of commerce in milk.

But it may be said that considerations, if not of necessity, at least of fairness justify pooling the proceeds of sales of fluid milk in the entire market and giving all producers a share therein. The milk industry, it is asserted, is peculiar in that it is necessary constantly to produce a surplus of 20 per cent of fluid milk because milk, being perishable, cannot be stored from day to day and enough must always be on hand to meet variations in the daily

[29]This is doubtless due to the fact that the increase in price provided for in the federal milk licenses and orders tends to stimulate production and to draw new producers into an already overcrowded market (R. Vol. II, 210).

demand. Thus, producers in the aggregate must always produce a greater supply than is used for fluid purposes. So far as that surplus is disposed of at lower prices the resulting loss should be prorated over the industry as a whole. Such is the argument. The analogy of statutes establishing a common fund for compensation for workmen injured in industrial accidents and exacting contributions to the fund from all employers in industry (*Mountain Timber Lumber Co.* v. *Washington,* 243 U. S. 219) and of statutes imposing assessment on banks to create a guaranty fund to make good losses of deposits in insolvent banks (*Noble State Bank* v. *Haskell,* 219 U. S. 104; *Abie State Bank* v. *Bryan,* 282 U. S. 275) is suggested. But the principle of these decisions cannot be pressed so far as to cover the necessities of the present scheme. For it is readily apparent that what is prorated here is the profits of the industry. The risk which is really to be spread is the risk that, because of competitive conditions, some producers will not get as high a return for their product as others. Obviously this goal bears no relation to the scheme, sustained in those decisions, for insuring all workmen or bank depositors against loss not occasioned by their fault, by spreading the financial responsibility for that loss over the entire industry so that the insolvency of one employer or bank would not leave them remediless.

If a lower rate of return to individual producers or groups of producers resulting from an excess of fluid milk constitutes a common hazard which all must share by pooling their profits, then the principle applies equally to every branch of agriculture or industry. For excess production in milk does not differ in its essence from excess production of any commodity. True, there must be a surplus of fluid milk of twenty per cent at the low point of yearly production. True, that surplus normally

increases to something over forty per cent in the spring. But similarly in other fields the need of producing enough to meet fluctuations in daily, seasonal or yearly demand, results in the production of a quantity which, because of changes in public taste, the invention of substitute and competing products or for a hundred other reasons, cannot be disposed of for the purposes for which it was produced or at the most favorable prices. So also under present industrial and technological conditions there exists, and, it is feared by many, must exist, a surplus of labor. Competitive conditions and changing demand leave some always unemployed or employed in less profitable fields.

Nor is the fairness and equity of prorating the surplus readily apparent. The very measures taken to that end tend to enhance the problem and increase the burden which is imposed upon those with fluid milk outlets. For by fixing prices, the amended Order tends to stimulate production in the milk shed and draw new producers into the market (R. Vol. II, 210). No attempt is made to regulate or decrease the surplus or control the amount of milk in the milk shed (R. Vol. II, 210). All farmers are encouraged to produce to the limit and thus make less and less valuable the markets of those with established fluid milk outlets. Moreover, no account is taken of the extent to which such producers have themselves borne their fair share of the surplus by taking their own steps to limit their production or spread out that production evenly or to produce milk inversely to the normal seasonal variation in supply.[30] Dealers with high percentage of

[30]Farmers can and do avoid the normal increased production at particular seasons through regulating feed, breeding times and the like. See Cassells, *Study of Fluid Milk Prices* (Harvard Economic Studies, 1937) pp. 12, 64-67; U. S. Dept. of Agriculture, *Some Problems in Establishing Milk Prices* (1937) pp. 47-53, 101; Black, *The Dairy Industry and the AAA* (Brookings Institution, 1935) p. 182.

fluid sales often encourage or require their producers to prevent seasonal surplus by levelling out production.[31] And the fact that certain producers are able to become connected with them is thus not entirely fortuitous. For such producers to accept a pool price "obviously means surrendering all the gains they have made by evening out their production. Some can, in a few years, adjust their production back to a less uniform basis and prosper as much as before, but many of them cannot—they have special advantages for the more uniform type of dairy production."[32] The doctrinaire conception of the amended Order, that all differences in return are inequitable, completely ignores these considerations.

This proposed scheme is not supported by any previous decisions of this Court. The basis on which the so-called pooling cases are rested is plainly inapplicable. There ulterior public advantage in the protection of workmen and depositors justified what was termed "a comparatively insignificant taking of private property, for what in its immediate purpose is a private use" (*Noble State Bank* v. *Haskell,* 219 U. S. 104, 110). But here, as we have shown, the taking both immediately and ultimately inures to the benefit of rivals in the market. And the amount taken can by no stretch of the imagination be termed insignificant, either absolutely or comparatively. There, too, it was considered that "the share of each party in a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume" (*Noble State Bank* v. *Haskell, supra,*

[31] U. S. Dept. of Agriculture, *Some Problems in Establishing Milk Prices* (1937), pp. 96-103.

[32] Black, *The Dairy Industry and the AAA* (The Brookings Institution, 1935) pp. 193, 194; *cf.* pp. 294-296. See also Cassells, *Study of Fluid Milk Prices,* pp. 61, 62; U. S. Department of Agriculture, *Some Problems in Establishing Milk Prices* (1937), p. 138.

at 111). But here there is clear lack of mutuality, as we have demonstrated. The proprietary handlers and their producers must contribute; the cooperative associations and their producers receive, but need not pay. That there are limits beyond which the pooling principle may not be carried was pointed out in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, in which the establishment of a unitary pooling system among railroads to provide pensions for superannuated railroad employees was held to constitute a taking of property without due process. Noting that unequal contributions were required from different carriers, that some always paid while others received, the Court ruled that the scheme could not be sustained on the basis of prior decisions as simply a joint adventure with mutuality of obligation and benefit. The equalization plan in the amended Order goes even further. A fortiori, it finds no support in the cases sustaining workmen's compensation and bank insurance funds. Those decisions clearly did not lay down the sweeping principle that either banks or employers could be required to guarantee their rivals against the possibility of losing money.

Appeal to decisions of this Court sustaining the provisions of the Transportation Act of 1920 for the division of joint rates and for the recapture of excess earnings (*The New England Divisions Case*, 261 U. S. 184, and *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456) in support of the present scheme is likewise futile. In *The New England Divisions Case*, the provisions of the Transportation Act of 1920 authorizing the establishment of joint rates and "just, reasonable and equitable divisions thereof as between carriers" were attacked as unconstitutional on the ground that the apportionment of a joint rate appropriated the property of one carrier for the benefit of another. The system of group rate

making and division of such joint rates was based, as the Court noted, upon the facts that, while many of the railroads were receiving ample revenues, others could not continue operation unless additional funds were procured; that increase of the rates of the needy roads alone might kill traffic on those roads and provoke more serious competition from automobile and motor carriers; and that a general rate increase, high enough to afford the needy roads relief, might give the prosperous roads an unreasonably large return upon their properties. In sustaining the apportionment of the increased joint rate, the Court pointed out that the revenues of the prosperous roads were not taken to support the weak; they still were entitled to, and still received, a fair return on their property; the increase was paid by the community, not from the treasuries of the prosperous roads. The suggestion will doubtless be made that the equalization scheme here under consideration is, like the division of joint rates, a method of apportioning an increased rate among producers according to their needs, that the producer selling to a dealer with a high percentage of fluid sales stands in the position of the prosperous roads and that nothing is taken from him by awarding to more needy producers a larger share of the increased prices. But the attempt to draw the analogy must fail. The attempted distribution of the fluid milk market cannot be sustained on the basis that one group of producers now has sufficient revenue and another group must have more if it is to continue in business. As we have already pointed out, there are no facts either in the record or subject to judicial notice tending to show that the general increase in price effected by the amended Order will not afford relief to the farmers disposing of their milk largely for non fluid purposes, that they cannot continue in business without receiving a larger share of the increased price, or,

that those having fluid milk outlets will receive an unreasonably large return. Nor does the producer with fluid milk outlets stand in the position of the complaining railroads in *The New England Divisions Case*. The effect of apportioning the increased rate left the prosperous railroad with all that it originally had and all that it was constitutionally entitled to—a fair net operating return upon its properties devoted to transportation. It was, at the very least, in the same position it held before the joint rates were increased and divided. But the effect of the present equalization scheme, as we have shown, is to leave some producers worse off than they were—to take part of what they otherwise would have received from the handler to whom they sold, and to take it without any consideration of their costs or of the rate of return left to them.

The same considerations serve to dispose of *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, as a pertinent authority. There the recapture provisions of the Transportation Act of 1920, which required carriers to contribute their earnings in excess of a certain amount to provide a fund to be used by the Interstate Commerce Commission in making loans to other carriers, were upheld. To be sure, the railroad whose excess earnings were taken was economically in a worse position by reason of the taking than it was before, since what was taken was earnings which had already accrued to it. But the validity of the taking was rested on the fundamental proposition that

> "The carrier owning and operating a railroad, however strong financially, however economical in its facilities, or favorably situated as to traffic, is not entitled as of constitutional right to more than a fair net operating income upon the value of its properties which are being devoted to transportation." (*Ibid*, at 481.)

And the Court pointed out that

> "The reduction of the net operating return provided by the recapture clause is, as near as may be, the same thing as if rates had all been reduced proportionately before collection." (*Ibid*, 483.)

Manifestly the taking from the producer of the benefit of his fluid milk outlets cannot be rested on these principles. It cannot be said that the producer "by investment in a business dedicated to the public service" must recognize that his obligation limits him to a fair and reasonable profit. Unlike the railroad he has not received a franchise as a quasi-monopoly requiring him in exchange to forego the right to profits in excess of a reasonable return. And even if he had, that fair and reasonable profit must be ascertained and rates established which will give him at least that. Of course, the equalization scheme makes no attempt to fix such rate for any individual producer or group of producers. The difference between it and the recapture clause is apparent.

We submit, therefore, that the equalization scheme is unsupported by authority and cannot be justified as an appropriate or necessary method of achieving the legitimate end of protecting interstate commerce in milk. Like the gas proration order considered in the *Thompson* case it is a glaring example of taking the valuable markets of some for the sole benefit of their competitors. As such, it stands condemned under the Fifth Amendment.

III.

THE AMENDMENTS TO ORDER NO. 4 ARE VOID FOR LACK OF THE ESSENTIAL FINDING REQUIRED BY SECTIONS 8c(17) and 8e OF THE ACT.

In discussing this point we shall show: first, that the Secretary of Agriculture used the post-war base period for the purposes of the amendments to Order No. 4; second, that the Act required the Secretary before using the post-war period as the base period for the purposes of such amendments to find and proclaim in connection with the issuance of such amendments that satisfactory statistics were not available for the pre-war period; third, that the Secretary did not make that finding and proclamation in connection with the issuance of the amendments to Order No. 4; and, fourth, that the absence of the prescribed finding invalidated the amendments.

A. The Post-War Base Period Was Used for the Purposes of the Amendments to Order No. 4.

The amendments to Order No. 4 themselves involved use of the post-war base period, 1919-1929. That fact was admitted throughout the trial before the master and in the hearings in the district court. It is clearly demonstrable.

The amendments to Order No. 4 changed the original order in respect to all three of the elements affecting the prices received by producers. These changes involved computation of the parity price which the producers should receive and that computation necessarily involved use of a base period. The post-war period was taken. The principal price tables introduced at the hearing on the proposed amendments showed only the price levels during the years 1919-1929 (R. Vol. II, p. 43, Appendix

B at pp. 54, 55, 58 and Exh. 2 thereto, at pp. 74, 89-93).[33] On the basis of this hearing, moreover, the Secretary issued the amendments and reaffirmed a prior finding that the prices fixed would tend to achieve parity with the post-war levels (R. Vol. II, pp. 46, 48, par. 15).

B. Sections 2, 8c(17) and 8e Prohibit Use of the Post-War Base Period for the Purposes of Amendments Unless the Secretary Finds and Proclaims in Connection With Their Issuance that Satisfactory Statistics Are Not Available for the Pre-War Years.

Section 2(1) of the Act states the policy of raising farm prices to parity with their level in the base period; it establishes the pre-war years, 1909-1914, as the base period in the case of milk.[34] Section 8c(4) together with section 8c(17) limits the power of the Secretary to the issuance of orders and of amendments tending to achieve that purpose. Section 2(2)(b) prohibits action raising prices above that level. There is a single exception, based upon necessity. Section 8e provides that if the

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[33] Appendix B attached to the Master's Report is not printed but was transmitted to the Clerk as an Original exhibit by order of the district court. (R. Vol. I, p. 134.)

[34] "The pre-war period was selected as the primary base period for most commodities in preference to the post-war decade primarily for two reasons. First, in the latter period the relationship between the prices of farm and industrial products was not normal. Second, the pre-war period is the most recent period when "economic conditions, as a whole, were in a state of dynamic equilibrium". Ezekial and Bean, *Economic Bases for the Agricultural Adjustment Act, United States Department of Agriculture*, 1933, pp. 26, 28. A parity price for milk, received by producers, in August 1937 would have been $2.25 if the pre-war period were taken as the base and $2.32 with the post-war period as a base. These prices are calculated from statistics published by the Department of Agriculture "for use in developing market agreements". See Appendix C, pp.

Secretary finds and proclaims in connection with the issuance of an order that no satisfactory statistics are available to show the purchasing power of the commodity during the pre-war period, then the base period "for the purposes of such order shall be" the post-war period, 1919-1929. When the Secretary made such a finding and proclamation in connection with the issuance of Original Order No. 4, its effect under section 8e was to establish the years 1919-1929 as the base period for the purposes of that order and that order only, leaving applicable for all other purposes the pre-war base period specified in section 2. Consequently, when the time came for issuing the amendments to Order No. 4, the pre-war base remained controlling until the Secretary should make a finding in connection with the issuance of the amendments, which if made would have fixed the post-war years as the base period of those amendments. He had the power to do this for section 8c(17) expressly states that the provisions of section 8e shall be applicable to amendments to orders. He had no power, however, to use the post-war period in defiance of section 2 without making the finding because the only power to use that period is conditioned by section 8e upon the finding being made in connection with the action being taken.

The correctness of the foregoing interpretation is shown by two propositions. First, the exception in Sec-

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131-133 *infra*. The Secretary did not use the post-war parity price stated above, basing his calculations instead on entirely different statistics that aimed at parity only for Class I milk (See R. Vol. II, p. 43, Appendix B, Exh. 2 thereto). However the difference between the post-war and pre-war parity prices stated above may be taken as a measure of the difference in result obtained by the use of the post-war period instead of the pre-war period. Applied to the total purchases of milk from producers by the petitioners H. P. Hood & Sons, Inc. and Noble's Milk Company during the first five months of the operation of Amended Order No. 4, August 1, 1938 to December 31, 1937, this difference of $.07 per cwt. amounts to $64,063.32.

tion 8e to the mandate in section 2(1) is not broad enough to cover the issuance of amendments involving use of the post-war base period unless they are accompanied by a new finding. Second, the Act taken as a whole and section 8c(17) in particular require a new finding to be made in connection with the issuance of such amendments.

1. A section 8e finding in connection with the issuance of an order does not establish the post-war period or any part thereof as the base period for the purposes of amendments to the order.

Section 8e provides:

> "*In connection with* the making of any marketing agreement or *the issuance of any order, if the Secretary finds and proclaims* that, as to any commodity specified in such marketing agreement or order, the purchasing power during the base period specified for such commodity in section 2 of this title cannot be satisfactorily determined from available statistics of the Department of Agriculture, *the base period, for the purposes of such marketing agreement or order, shall be the post-war period,* August 1919-July 1929, or all that portion thereof for which the Secretary finds and proclaims that the purchasing power of such commodity can be satisfactorily determined from available statistics of the Department of Agriculture." (Emphasis supplied.)

The italicized words make it clear that the proclamation of a finding by the Secretary in connection with the issuance of an order does not fix the base period as the post-war period for all purposes, present and future, but only "for the purposes of such order", that is to say, the order in connection with the issuance of which the finding was made. Use of the post-war base period without a new finding and proclamation for any other purposes would

be outside the exception established. Plainly the Secretary is required to make a new finding and proclamation that satisfactory statistics are not available for the prewar base period before he may issue a new order predicated on the post-war base period. Section 8e is the only exception to the mandate of section 2. Section 8e declares that after a finding and proclamation is made in connection with an order, the post-war period shall be the base period "for the purposes of *such* order". Under the plain language of Section 8e, each finding in connection with an order fixes the base period for that order only. Consequently a finding in connection with one order cannot be held to fix the base period for another and subsequent order.

The question here involved is whether the establishment of a base period "for the purposes of such order" is the establishment of the base period for the purposes of any amendments to the order in connection with which the finding and proclamation were made. If it is, then the amendments to Order No. 4 were properly issued. If, as we submit, it is not, then a new finding should have been made in connection with the issuance of the amendments.

The practical function of a base period shows that the words "for the purposes of such order" do not include the purposes of amendments to the order but refer to the purposes for which a base period is used in the issuance of an order. The specification of a base period is significant because it supplies the tools for the formulation of the order's terms. Prices fixed for milk must tend to be parity prices, and determination of the parity price involves ascertainment of the purchasing power of milk during the base period. That requires, first, statistics showing the prices received by milk producers during the base period and, second, a series of index

numbers showing the relative cost of articles bought by the producers in the base period and at the present time. A price is then fixed which will reflect the percentage of change shown by the index numbers. That is the parity price. (R. Vol. II, p. 205, par. 213). Promulgation of terms which do not fix prices but which also govern the farmer's return—for example, provision for a base rating scheme to control surplus—requires a similar use of base period statistics to determine the precise level of purchasing power to be attained.

After these computations the Secretary must then summarize his conclusions and find that the order and all its terms will tend to raise the producers' purchasing power to parity with the level shown by the statistics (section 8c(4)). And, if handlers fail to agree to the regulation he must also determine that its issuance is the only practical way to achieve that result (section 8c(9)(B)). In short, the specification of a base period "for the purposes of" an order determines the level of purchasing power to be attained by the order and designates the statistics to be used in its formulation and issuance.

The issuance of amendments involving use of a base period is a new and separate step. They require similar but their own computations, involving a reexamination of the past prices of the commodity and of the past and present costs of articles bought, in order that the Secretary may formulate *their terms* and make the findings prerequisite to *their issuance.* In doing so, he needs to use a base period but that use is not use for the purposes of the original order any more than it would be if the amendments were in the form of an entirely new order. Consequently, the words "for the purposes of such order" do not include the different purposes of amendments to an order. The base period has chiefly a

practical function. The quoted words must be given a practical sense.

The Secretary recognized this distinction in his proclamation in connection with original Order No. 4,—"the period August 1919-July 1929 is hereby found and proclaimed to be the base period to be used in connection with ascertaining the purchasing power of milk . . . *for the purpose of* the execution of a marketing agreement and *the issuance of an order*" (R. Vol. II, pp. 6. 7, par. 4. (Emphasis supplied.)). He seems to have used that phraseology uniformly in all his proclamations under section 8e of the Act.[35] The choice of words is significant. The Secretary has no power to limit or expand the purposes for which the post-war period is to be used upon his making the specified finding and proclamation. Consequently the Secretary must have been describing in his proclamation what he understood to be the effect of his finding and proclamation, and therefore by stating that the post-war period was to be used "for the purpose of the *issuance* of an order" the Secretary showed that he believed that to be the effect of Section 8e.

The fact that amendments may and often do differ from new orders only in name furnishes another strong practical reason for concluding that the words "for the purposes of such order" were not intended to include the purposes of amendments to the original order in connection with which a finding has been made. Amendments are not part of the original order. The familiar practice in legislative bodies of striking out all but the enacting clause and substituting new substantive provisions shows how thorough-going an amendment can be. An administrative

[35] 1 Federal Register 607, 647, 683, 1125, 1329, 1690, 2023, 2100; 2 Federal Register 502, 504, 1188, 1942; 3 Federal Register 735, 1140, 1741, 1779, 1893, 1957, 2439; 4 Federal Register 403, 989, 1198.

official may by amendments to his orders follow the analogy and accomplish an equal change. Hence, amendments may be substantially the same as superseding orders, which require a new finding if the post-war period is to be used. This was clearly true of the amendments in the instant case.

In form the amendments to Order No. 4 were a new and separate order; they were promulgated under the title "Order of the Secretary of Agriculture . . . amending Order No. 4 . . ." (R. Vol. II, p. 46).

In substance they were a new order. Original Order No. 4, if not legally at least practically, was dead from prolonged suspension (R. Vol. II, p. 36, par. 7; R. Vol. II, p. 40, par. 10). For more than ten months there was no order in force; there was in Boston no federal regulation of milk. The Secretary manifestly considered that he was beginning again. He first gave notice of hearings upon a proposed new order (R. Vol. II, p. 37, par. 8). Even after he had terminated the suspension of the original order (R. Vol. II, p. 40, par. 10) and had proposed the amendments, he told the farmers that when they voted upon the amendments their real choice would be between them and no order at all (R. Vol. II, pp. 195-198, pars. 192, 193, 195 and Exh. 14 and 15 at R. Vol. III, pp. 160, 161).

The content of the amendments and the changes they made show that the amendments wrought a system that was new. The original order had the fundamental purpose of increasing the returns to milk producers by forcing handlers to pay a blended price. Three factors controlled the amount of that price: the Class I price, the Class II price and the percentage of market surplus or Class II milk included in the pool. In other provisions the adminstrative framework was set up. Only the ultimate purpose and part of the framework were con-

tinued in the amendments. The factors controlling the blended prices were radically changed. The Class I price was altered; the formula by which the Class II price was to be established for each delivery period was changed; and, most significant of all, the base-rating scheme which gave some control of the surplus in the pool was entirely abolished. The amendments, therefore, changed the regulation in its most vital aspects and established an order which taken as a whole was new.

Thus both the form and the substance of the amendments to Order No. 4 furnish a striking illustration of the reality of the distinction between an order and amendments thereto. Throughout the Act Congress preserved in the words the difference in substance. Where it meant both orders and amendments it used both words (e.g., sections 8a(7), 8c(1), 8c(16)(C), 8c(18)). Where it used "order" alone (e.g., sections 8c, 8d, 8e) it appears to have done it consciously for it elsewhere expressly stated that amendments should be governed by the provisions applicable to orders just as if they were entirely new (section 8c (17)). Nor is there any reason for stretching the phrase, "for the purposes of such order", so that it will include the purposes of amendments. In the first place, the Secretary has ample power to make the necessary finding and establish the post-war period as the base period for the purposes of the amendments. Section 8c(17) provides that section 8e shall be applicable to amendments as well as to orders. In the second place, section 8e is an exception to the general rule established in the declared policy of the Act. As such, it should be narrowly construed.

2. The Act affirmatively requires a finding and proclamation of unavailability of satisfactory pre-war statistics to be made in connection with the issuance of amendments involving use of the post-war base period.

Hitherto we have considered the scope of the exception in section 8e to the general rule of section 2. It appears to be too narrow to cover amendments involving use of the post-war base. Any possible doubt, however, is foreclosed by the fact that the Act affirmatively requires a new finding to be made in connection with such amendments. This may be shown in three ways.

First, orders under the Act may be issued either with or without executed marketing agreements (sections 8c (8), (9)). If an amendment to an order that has been issued with an executed marketing agreement is proposed, obviously that must be accompanied with a new agreement (sections 8c(17), 8c(8)). Any modification of a marketing agreement is a new contract. It may even be signed by different handlers. The finding and proclamation made in connection with the former agreement established the post-war period as the basis "for the purposes of such agreement" only. Therefore, a new agreement must be issued, and clearly the issuance of a new agreement must be attended by all the formalities required by section 8e if other than pre-war parity prices are to be attained. This is so although the new agreement follows and supplements an earlier agreement that was issued under section 8e.

Manifestly, the same finding and proclamation under section 8e must be made for amendments to orders issued in connection with executed marketing agreements as for the amendments to the marketing agreements themselves. It would be absurd to require it in the one case and not in the other. Agreements and amendments are pro-

mulgated together and must contain parallel terms, (section 8c(8), (9), (17)). The one finding and proclamation would suffice for both.

The same result obtains where, as in the instant case, orders are issued without executed marketing agreements. (See R. Vol. II, pp. 44, 45, par. 14.) The procedure is identical. The single variance is that a majority of the handlers in the market fail to execute the proposed marketing agreement. In that event the failure is supplemented by the determination of the Secretary specified in section 8c(9). But amendments to orders issued without marketing agreements are, by the specific requirement of the statute, accompanied with new proposed marketing agreements. Since a strict compliance with the provisions of section 8e is required whenever a new marketing agreement is proposed, it follows that these requirements must likewise be observed whether the earlier order was issued with or without a signed marketing agreement.

The second indication that amendments involving use of the post-war base period must be accompanied by a new section 8e finding is the structure of the Act. It shows that amendments are to be treated exactly as orders.

Section 8c(1) empowers the Secretary to issue and amend orders subject to the provisions of the following subsections. The first fifteen of them set forth a comprehensive scheme of administrative regulation. They are phrased in terms of orders only. They prescribe the procedural steps (sections 8c(3), (4)), and the administrative findings essential to the issuance of a valid order (section 8c(4)), the terms which may be included (sections 8c(5), (7)), and the producer approval to be obtained (sections 8c(8), (9), (12)). Then follow provisions detailing to whom (sections 8c(10), (13)), and to

what regions an order may apply (section 8c(11)), what its consequences shall be (section 8c(14)), and how a handler may obtain administrative relief (section 8c(15)). The next to the last subsection of the original section 8c then rounded off the scheme by provision for the suspension and termination of orders, (section 8c(16)).[36] Section 8c(17) was the last; it provides that the preceding subsections of section 8c and the provisions of sections 8d and 8e applicable to orders shall be applicable to amendments to orders. Sections 8d and 8e are similarly phrased in terms of orders only. They are a fundamental part of this structure for administrative regulation. Doubtless, they were set out apart from section 8c solely because they apply not only to orders but also to the marketing agreements authorized by section 8b.

Passing over section 8c(17) for the moment, it is plain that these sections, 8c, 8d and 8e, establish a complete system for the formulation, issuance, administration and termination of orders alone. Each new order whether it supplants an old one or touches a new field must be formulated and issued precisely in the manner of an old. With respect to establishment of a base period this is doubly clear. Section 8c(4) refers to the pre-war base period established by section 2. Section 8e provides that after the specified finding has been made in connection with the issuance of an order, "the base period, for the purposes of such . . . order, shall be the post-war period". Thus, section 8e does not give the finding the effect of establishing the post-war period as the base for the purposes of future orders regulating the same commodity. Each of them would require a new finding before the post-war period could be used.

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[36]Subsections 18 and 19 were added by amendment in 1937, two years after the other sections were enacted. See Appendix E, *infra*.

In that system of administrative procedure and regulation amendments have no separate place and had section 8c(17) been omitted no provision would have been made for them beyond their bare mention in section 8c(1). Section 8c(17), however, incorporates that system by reference and establishes it for amendments also. And, this includes the requirement that a finding be made under section 8e before any use of the post-war base period for the purposes of amendments. In effect section 8c(17) directs section 8e to be read "In connection with . . . the issuance of any order or *amendment thereto*, if the Secretary finds and proclaims . . . the base period for the purposes of such order *or amendment thereto as the case may be* . . . shall be the post-war period . . . "

By the structure of the Act, therefore, any ambiguity concerning the meaning of section 8e is dispelled. Section 8c(17) shows plainly that amendments are to be treated as new orders, that the same finding that the policy of the Act will be effectuated must be made in each instance, that the same determinations of producer approval are necessary and that the same procedural safeguards are required.

The third indication that the Secretary must make the specified finding and proclamation in connection with the issuance of amendments based on the post-war period is the language of section 8c(18) of the Act. Section 8c(18) was first enacted in the Marketing Agreement Act of 1937 two years after the law first became effective in 1935, and shows what Congress believed it had already required by sections 2, 8c(17) and 8e. The Secretary is specifically directed, prior to prescribing "any term in any marketing agreement or order or amendment thereto", if that term is to fix milk prices, to compute a parity price "in accordance with section 2 and section 8e". By giving these identical instructions for making agree-

ments, for issuing orders and for issuing amendments it requires the same acts to be performed in each instance. Since obedience with respect to an agreement or order would always involve either use of the pre-war base fixed in section 2 or the contemporaneous finding and proclamation described in section 8e, the latter act must be also necessary to the valid issuance of amendments based upon the post-war period.

It is no objection to this construction of the statute that the Secretary might be required to make a finding under section 8e in connection with the issuance of any amendment, however trivial. Such requirement would impose no serious burden upon the Secretary since in determining the availability of adequate statistics he need consider only such statistics as are available in his own department. The burden on him would be negligible compared with the burden of holding hearings, determining whether the amendment has the necessary producer approval and complying with the other procedural requirements of section 8c which are clearly made applicable to amendments by section 8c(17). Particularly is this so since in the instant case the amendments to Order No. 4 were of such a fundamental character as directly to involve the use of a base period.

In the court below respondents suggested that if the Secretary made a section 8e finding and proclamation in connection with an order then it was unnecessary for him to make a new one in connection with the issuance of amendments to that order. The first difficulty in so construing the Act is that it creates a single exception to directions given to the Secretary by section 8c(17)—directions to treat amendments just like orders for the purposes of section 8c, section 8d and section 8e. There is no warrant for reading that exception into section 8c(17). Taken at its face value, it requires the Secretary

to discover his duties and powers in the issuance of amendments by substituting "amendment" for "order" in every instance in which it is used in sections 8c, 8d and 8e.

The second objection to the respondents' interpretation of the Act is that under it the reference to section 8e in section 8c(17) is vain. Plainly under that interpretation Section 8e would provide that if the stated finding is made, the base period for the purposes of such order and its amendments "shall be" the post-war period or that part of it for which the Secretary finds statistics to be available. If in issuing an order the Secretary made such a finding and used the post-war period or any part of it, the mandatory "shall be" would prevent him from making a change when he issued the amendments. And therefore the reference to section 8e in section 8c(17) could not be held to authorize a change without creating an inconsistency between section 8c(17) and the provisions of section 8e. Nor could the reference be simply an injunction to use the same base period as was used for the order. Upon respondents' interpretation, section 8e is that. The single function the reference might perform would be to make it possible for the Secretary to use the post-war period for amendments to an order which had been based upon the pre-war period. That interpretation, however, disregards the plain meaning of the words and the fact that section 8c(17) is applicable to amendments generally and not simply to a very few.

The third objection is the serious difficulties which would be created in the construction of section 8c(18). Beyond a doubt that section verbally requires the Secretary to take the same steps in computing a parity price in amending an order that he takes in issuing it. But if without a new finding section 8e permits and requires

the same period to be used for amendments as was used for orders, then not only are the same steps not required but they are forbidden. A new order could be based on pre-war statistics which became available but an amendment could never be if the order had been based on the post-war period or a part of it. Section 8c(18) seems incapable of being read in any way which would sanction that result, and, since it cannot be, section 8e should be given the normal meaning of its words and left to fit into the structure of the Act.

3. The policy of the Act shows that Congress intended to condition the power of the Secretary to use the post-war period for the purposes of amendments upon a contemporaneous finding under sections 8c(17) and 8e.

The practical and economic reason for the requirement that there be a new finding in connection with issuance of each amendment is clear. Section 2 sets forth the dominant purpose of the Act in the declaration of the policy to establish farm prices at parity with their level during the pre-war base period and no higher. The rest of the Act must be read with that intention in view. In section 8e a secondary base, the post-war period, was established as a substitute to be used only if the Secretary found and proclaimed that lack of statistics made impossible attainment of the primary goal. Conceivably, Congress might have ordained that a single finding for each regional classification of a commodity should once and for all change the base period. It did not. Section 8e shows that the Congress believed that economic research is progressive and that the necessity might at any time be removed, for that section plainly requires the pre-war statistics to be examined and their unsatisfactoriness to be proclaimed before the post-war period should be used in a new order supplanting an old one. The reasonable-

ness of that belief has already been proved; between the promulgation of Order No. 4 and its amendment the Department of Agriculture prepared statistics showing the pre-war prices of milk for the expressed purposes of use in administrative regulation under the present statute (R. Vol. II, p. 207, par. 215, Vol. III, pp. 201-209).[37]

Having formed that intention, it remained for Congress to fix the time when the Secretary should reconsider the possibility of achieving the primary goal. Had overpowering weight been given to the dominant purpose that the pre-war period be used whenever possible, the Secretary would have been directed to watch continuously for new and satisfactory statistics and to make the change when they appeared. Because that would be unduly burdensome the primary goal was so far abandoned. It was not unduly burdensome to require the investigation in connection with the issuance of a new order or of amendments to an old because at such a time the Secretary would in any case be making parity computations and considering pertinent economic data. In short, since dates for investigating statistics were to be fixed, those occasions were appropriate. And in order to make certain that every appropriate chance to return to the dominant purpose would be taken, the Secretary was given no power to take any action aiming to establish prices at parity with those in the post-war base period unless he first found and proclaimed that statistics for the prior period were still unavail-

[37] Another instance is the development of statistics showing grapefruit prices. In that instance the Secretary did in fact change the base to use them. See 4 Federal Register 971. The recent development of a price series for Vermont covering more than a century shows how fruitful research in this field may be. See PRICES PAID BY FARMERS FOR GOODS AND SERVICES AND RECEIVED BY THEM FOR FARM PRODUCTS 1790-1871, WAGES OF FARM LABOR, 1780-1937, T. M. Adams, University of Vermont and State Agricultural College (1939).

able. The necessity of making the finding would force the Secretary specifically to direct his mind to the question and thus would tend to prevent an inadvertent use of the post-war base period to ascertain the purchasing power of a commodity at a time when the pre-war period could be used. The instant case furnishes an example, for when Order No. 4 was amended there were available new statistics which upon their face appear satisfactory and which the Secretary seems never to have considered."[38]

If a section 8e finding in connection with the issuance of an order fixed the base period for the purposes of amendments, the Secretary would be hindered, not aided, in effectuating the declared policy. Economic data rapidly changes; what seemed satisfactory may in time be shown unreliable and gaps in data may later be abridged.[38] But, if section 8e has the meaning respondents would give it and declares what the base period "shall be" for amendments, then the Secretary could make no change from all or part of the post-war period used in connection with an order without promulgating a wholly new order instead of issuing amendments to change certain parts. It is certainly important, and in accordance with the intention of the Congress, to construe the Act to allow him that latitude rather than to bind him to undesirable statistics, especially when that construction

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[38]The preamble to the price series published by the Department of Agriculture in February 1937 states that it was constructed to remedy inadequacies and "for use in developing marketing agreements." R. Vol. II, p. 207, par. 216, Vol. III, pp. 201, 202. See Appendix C, *infra*, pp. 131-133.

[38]The Secretary used the pre-war period in an earlier Boston license. R. Vol. II, pp. 206-207, par. 214, 215. He must have found it could properly be used. These statistics were found unsatisfactory in promulgating Order No. 4. R. Vol. II, p. 6, par. 4. Subsequently statistics were then developed for use in this connection. See footnote 38, *supra*.

alone will effectuate the policy of the Act by requiring use of the pre-war base period as quickly as the opportunity arises. Section 2(2), however, does more than state an aim; it specifically denies to the Secretary power to take any "action" aimed at raising prices above the pre-war level. Since the issuance of amendments involves administrative "action", the occasion of their issuance is not only a convenient but a necessary occasion for the Secretary to be required to re-examine the pre-war statistics lest he take action raising prices to a level which examination of the new pre-war statistics would show to be higher than the ceiling fixed by section 2(2) of the Act.

C. The Secretary Made No Finding and Proclamation of the Unavailability of Pre-War Statistics in Connection with the Issuance of the Amendments to Order No. 4.

The Secretary admittedly made no separate or express finding and proclamation concerning the availability of satisfactory pre-war statistics in connection with the issuance of the Amendments to Order No. 4 nor in connection with the proposed marketing agreement to accompany it. No evidence of one was offered at the hearing (R. Vol. II, p. 75, par. 17); and the Court will take judicial notice that none was made. *Caha* v. *United States*, 152 U. S. 211, 221, 222; *Heath* v. *Wallace*, 138 U. S. 573, 584; *Thornton* v. *United States*, 271 U. S. 414, 420.

In the district court the respondents argued and the judge held that in the recitals preceding the amendments the Secretary impliedly reaffirmed his original finding and proclamation and that this implied reaffirmation was a sufficient compliance with the requirements of sections 8c(17) and 8e (R. Vol. I, pp. 114, 123). The particular recital on which reliance was placed states:

"Whereas the Secretary finds upon the evidence introduced at the hearing upon such proposed amendment, said findings being in addition to *the findings made upon the evidence introduced at the hearing on said order, said original findings* being herewith ratified and affirmed . . ." (R. Vol. II, pp. 46, 48, par. 15, emphasis supplied).

Only "said original findings" were ratified. The word "said" plainly refers to original findings which had already been mentioned. The only original findings mentioned in the entire amending order were those made upon the evidence introduced at the hearing on the original order. Therefore they were the only ones reaffirmed.

The finding and proclamation that statistics were not available for the pre-war years was not one of these. That finding and proclamation was made on January 25, 1936, and neither had to be nor purported to be made on evidence introduced at the hearing conducted the month before (R. Vol. II, pp. 6, 7, par. 4). Moreover, when in February, 1936 the Secretary issued Order No. 4, he recited first that he *had made* the finding and proclamation as to the base period and then in the following paragraph recited that he *now made* certain findings upon the evidence introduced at the hearing on the order (R. Vol. II, pp. 10, 12-15). Nowhere among these findings on the evidence is the unavailability of statistics mentioned. Those contrasting recitals show plainly that the section 8e finding was intentionally omitted from the group of findings made upon the evidence introduced at the hearing. Therefore it was not reaffirmed.

There is a second indication that the Secretary in the quoted recital did not intend to make a finding and proclamation that satisfactory statistics were not available to show the purchasing power of milk in the pre-war

period. His consistent practice in proceeding under section 8e has been to issue a formal finding and proclamation distinct from any other recitals or determinations. R. Vol. II, p. 6, par. 4; 1 Federal Register 607, 647, 683, 1125, 1329, 1690, 2023, 2100; 2 Federal Register 502, 504, 1188, 1942; 3 Federal Register 735, 1140, 1741, 1779, 1893, 1957, 2439; 4 Federal Register 403, 989, 1198. The fact that this practice was not followed here tends strongly to show that the Secretary did not intend by the recital in the amending order to make the finding and proclamation contemplated by section 8e.

That conclusion is indisputable but it is not necessary to go so far. Where a statutory finding is required the finding must clearly and expressly appear; it cannot be supplied by implication or by a strained construction of the words. *Mahler* v. *Eby*, 264 U. S. 32, 44; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 433; *Atchison Ry.* v. *United States*, 295 U. S. 193, 202. Even if the plain meaning of the language used in the amending order could be disregarded and even if all the facts leading to the conclusion that the original section 8e finding was not made upon evidence introduced at the hearing could be disregarded, still the question would remain evenly balanced. There would be utter doubt whether the Secretary in fact found in connection with the issuance of the amendments that statistics were not then available for the prewar period; the statute's requirement of a "finding" would not have been met. "The difficulty is that it [he] has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency.". Justice Cardozo, in *United States* v. *Chicago, M. & St. P. & P. Ry.*, 294 U. S. 499, 510.

The principal that a finding upon which power is conditioned must be clearly and certainly made is peculiarly applicable to the instant case. Whatever may be the precise purpose of the requirement that the Secretary "proclaim" as well as "find", it is at the very least an emphatic direction to make an announcement of the finding as clear, as specific and as express as the similar findings required of other administrative officers and agencies. The recital preceding the amendments to Order No. 4 does not meet that test.

D. The Amendments to Order No. 4, Being Unsupported by the Prescribed Statutory Finding and Proclamation, Are Void.

The Marketing Agreement Act of 1937 grants to the Secretary a power to issue orders and amendments regulating the dairying industry, but that power is a conditional one. It exists only upon his ascertaining certain specified facts. For example, the power to issue a regulation is limited by the statutory requirement that the Secretary shall issue it only after he finds that it will tend to accomplish the purposes of the Act (sections 8c(4), 8c(17)). One essential characteristic of administrative regulation is that the action taken is action which an expert has found will achieve a result. The Secretary has no more power to issue milk orders which he has not found will tend to effectuate the policy of the Act than he has power to issue orders whose substantive terms are not authorized by the Act. If he has not made the determination, the courts cannot supply it, for it was his to make. The actual tendency of the regulation is immaterial; it would be valid if the official whose expert opinion was required reasonably determined it would achieve a specified result; it would be invalid if he did not. The administrative conclusion is the basis of a valid regulation. The find-

ing is required because it is the expression of that determination, the proof that it has been made, and the indication that there existed the basis or "quasi-jurisdictional" facts essential to the validity of the administrative action. If the finding is lacking the action is void. *Florida* v. *United States*, 282 U. S. 194, 215; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 433-434; *United States* v. *Baltimore and Ohio R.R.*, 293 U. S. 454. Where Congress has itself adopted that philosophy and has itself expressly conditioned administrative power upon a finding, then the finding as the embodiment of the administrative decision is the statutory basis of the power. If the condition is not performed the power does not exist. Its purported exercise is a nullity. *Wichita Railroad & Light Co.* v. *Public Utilities Comm.*, 260 U. S. 48; *Mahler* v. *Eby*, 264 U. S. 32, 44. Such findings must be distinguished from a mere statement of the grounds for a decision. *United States* v. *Baltimore and Ohio R.R.*, 293 U. S. 454, 464. These are desirable but not indispensable. *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 86. They must also be distinguished from a series of expert findings on the basis of which no administrative order will issue. *Virginian Ry.* v. *System Federation No. 40*, 300 U. S. 515, 561-562. In neither of those cases is the finding essentially the actual basis of regulation.

The rule that where administrative power has been conditioned on a finding the finding must be made or the exercise of the power is void is also applicable to the section 8e finding which the statute required to be made and the Secretary did not make in connection with the issuance of the amendments to Order No. 4. The only power to use the post-war base period for the purposes of amendments, the only power to issue amendments which tended to fix prices at post-war parity was expressly conditioned by the Act upon the contemporaneous expert determina-

tion and finding that such amendments were necessary because the pre-war period could not be used. That determination and that finding characterize the amendments just as does the finding that they tend to achieve the policy of the Act. Lacking that determination, the amendments are not the kind authorized because the Secretary's expert characterization as "necessary for lack of pre-war statistics" has not been made.

The section 8e finding and proclamation have also a peculiar importance. Not only are orders without them unauthorized but even orders with them are a departure from the primary purpose of the Act to the secondary intention of fixing prices at parity with the post-war levels if it should be necessary. Had the Congress so wished it might have allowed the Secretary to cover the question of that necessity in his general finding that the amendments would tend to effectuate the policy of the Act. It did not do so. Instead it expressly conditioned the power to use the post-war period upon the Secretary's making each time he wished to use it a finding and a proclamation of the unavailability of satisfactory pre-war statistics. The purpose of that provision must have been to authorize only such use of the post-war base period as the Secretary found to be necessary while directing his mind to that specific problem and embodying his conclusion in a finding and proclamation. Absent the finding, therefore, the use is not authorized.[40]

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[40]When a statutory finding is made, the mind of the administrative officer is directed to the precise issue that the legislature desired him to consider; hence the possibility of an oversight will be minimized. The instant case furnishes a fair example. Had the Secretary re-examined the available statistics for the pre-war period when he issued the amendments to Order No. 4 with a view to making the finding and proclamation required by the Act he might not have issued them on the basis of the post-war period. Between the dates of the original order and the amendments there became available statistics showing milk prices in the New England states which were published by the

Since the amendments were based upon the post-war period and since the finding which alone under the statute would create the power to issue such amendments was not made, their issuance was unauthorized and they are void. *Wichita Railroad & Light Co.* v. *Public Utilities Comm.*, 260 U. S. 48; *Mahler* v. *Eby*, 264 U. S. 32, 44; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 433-434. Cf. *Florida* v. *United States*, 282 U. S. 194, 215; *United States* v. *Baltimore & Ohio R.R.*, 293 U. S. 454. Mr. Justice Cardozo, dissenting in the *Panama Refining Company* case, discussed the cases just cited and then stated the principle applicable here:

> "In each it was a specific requirement of the statute that the basic fact conditioning action by the administrative agency be stated in a finding and stated there expressly. If legislative power is delegated subject to a condition, it is a requirement of constitutional government that the condition be fulfilled. In default of such fulfillment, there is in truth no delegation, and hence no official action but only the vain show of it." 293 U. S. at 447-448.

Department of Agriculture with the express statement that they were prepared for use under the statute reenacted by the present Act. Whether the Secretary would have found them satisfactory cannot and need not be decided for his failure to make any finding upon them shows that he may never have considered them. And, since they show the parity price to be lower than it would be if based upon the post-war period, this neglect may have caused the prices to exceed any which may be fixed under the present Act. See footnote 34, *supra*, and Appendix C *infra* pp. 131-133.

IV.

THE MARKET ADMINISTRATOR FAILED TO COMPLY WITH THE PROVISIONS OF THE AMENDED ORDER.

Apart from any questions as to the constitutionality of the Act or the amended Order, or as to compliance by the Secretary with the provisions of the Act, the decree of the court below is erroneous for it requires the payment of moneys which under the terms of the amended Order itself are not due. In operating the equalization pool the Market Administrator, we contend, violated the plain provisions of the amended Order. In the computations, on the basis of which he announced blended prices and determined the equalization payments due from handlers, he took into account milk which the amended Order requires to be excluded from consideration. The result was to affect in every delivery period the amount which the petitioners were required to pay and the blended prices which its producers were entitled to receive (R. Vol. II, p. 177, par. 173).

The amended Order, we shall show, applies only to milk which can legally be sold for consumption as fluid milk in the Boston market. Milk cannot legally be sold for consumption in Massachusetts unless the producer has a certificate of registration, issued under the provisions of Massachusetts statutes, certifying that his dairy farm has been inspected and found to meet the minimum sanitary requirements laid down by law. Yet in every delivery period from August 1 through December, 1937, the Market Administrator, in computing the blended price, included milk purchased for sale in Massachusetts from producers who did have such a certificate (R. Vol. II, p. 176, par. 170). The ruling of the court below that the

Market Administrator satisfactorily complied with the amended Order (R. Vol. I, 124) cannot be sustained.

A. THE AMENDED ORDER REQUIRES THAT, IN COMPUTING THE BLENDED PRICE AND THE EQUALIZATION PAYMENTS, MILK NOT PRODUCED IN ACCORDANCE WITH MASSACHUSETTS HEALTH REQUIREMENTS BE EXCLUDED.

At the very outset, the amended Order carefully defines the meaning of the terms it uses (Article I; Appendix E.) The term "producer" is there defined (Article I, par. 4) as "any person who, in conformity with the health regulations which are applicable to milk which is sold for consumption as fluid milk in the Marketing Area, produces milk and distributes, or delivers to a handler, milk of his own production". To come within the definition, therefore, two things are necessary: first, the person must produce milk and distribute or deliver it to a handler; second, that production and distribution must be in accordance with the health regulations applying to milk which is sold for consumption in the market. It is not enough that a dairy farmer produce and deliver milk. The test is: Has that milk been produced in such a way that it can be sold in the marketing area; has the farmer a product which can legally be sold? In explaining the definition, the Economic Brief, prepared by the Dairy Section of the United States Department of Agriculture and submitted at the hearing conducted by the Secretary on the proposed original Order (R. Vol. II, p. 6, par. 2, Appendix A, not printed but certified to this Court as an original exhibit), states, at pp. 101, 102: "Milk which does not meet these requirements [i.e. the health requirements applicable to milk to be sold for consumption] cannot legally be sold as milk in the Greater Boston Marketing Area, hence the handlers of such milk should not be

subject to any Proposed Marketing Agreement and Proposed Order relating to such milk." And conversely, of course, the price to be paid for milk which can legally be sold should not be affected by the competition of illegally sold milk. The question is not simply one of propriety or of discouraging violations of the law. The expense of complying with health requirements imposes a cost of from 35 to 50 cents per hundredweight upon the producer of fluid milk (R. Vol. II, p. 112, par. 55). He must install cooling equipment, clean his stables more frequently, use a specified type of pails (R. Vol. II, p. 111, par. 55). Manifestly the price he is to receive, and the amount that the handler to whom he sells is to pay, should not be affected by the milk of other producers who have not incurred these expenses by complying with the laws.

The only milk, therefore, which the amended Order purports to cover, is milk produced in conformity with the health requirements governing milk sold in the Boston market. It is only as to such milk that minimum rates are fixed and only such milk is to be included in the pool on which the blended price and equalization payments are based. Thus Article IV fixes minimum prices for Class I and Class II milk to be paid to "producers" or associations of "producers"; Article V requires each handler to report in each delivery period milk received from "producers" or handlers, or produced by the handler himself; Article VII requires the Administrator to compute the value of milk sold or used by each handler which was not purchased from other handlers—i.e., which was purchased from "producers" or produced by the handler himself—and on the basis of such values to compute a uniform blended price; and Article VIII requires each handler to pay that blended price to each "producer" from whom he purchased and to pay the difference between that price and the value of his milk to other "producers" through

the Administrator. In computing the blended price, therefore, the only milk which the Administrator can take into consideration is milk purchased from "producers" or produced by the handler himself. And that milk is defined by the amended Order as milk which has been produced in compliance with the applicable health requirements, and which can thus legally be sold in Massachusetts.

B. MILK PRODUCED ON A DAIRY FARM AS TO WHICH THERE IS NOT IN EFFECT A CERTIFICATE OF REGISTRATION ISSUED PURSUANT TO MASSACHUSETTS GENERAL LAWS, C. 94, §§16A-16C, IS NOT PRODUCED IN CONFORMITY WITH THE APPLICABLE MASSACHUSETTS HEALTH REQUIREMENTS.

Massachusetts has developed an elaborate and comprehensive system of protecting its citizens from unwholesome and impure milk and of assuring that the supply of milk will be produced under sanitary conditions. It first approached the problem by setting up standards of quality and wholesomeness of milk without attempting to oversee the conditions under which it was produced. Thus it established the "Massachusetts legal standard" as to the percentage of solid and butterfat content of milk, skimmed milk and cream (General Laws, Chapter 94, Section 12) and prohibited sales of milk, skimmed milk or cream below that standard (Section 20); forbade sales of adulterated or impure milk or milk from diseased or refuse-fed cows (Section 19), regulated the cleanliness of milk containers (Sections 45-48) and provided for standards for the production of "Grade A Milk" (Sections 13-14A, amended by Acts of 1933, Chapter 263, Section 1, now General Laws, Chapter 94, Sections 13-13E). By Acts of 1932, Chapter 305, a new and further step was taken to regulate, not only the kind of milk sold, but to insure its purity by establishing a uniform state control

of the conditions under which it was produced. That statute (Section 1) set up a milk regulation board with the power to establish "uniform minimum requirements for the inspection of dairy farms"; provided (Section 3) for the issuance by a state officer, the director of the division of dairying and animal husbandry of the state department of agriculture, of certificates of registration for dairy farms after an inspection which indicated that such farms complied with those uniform minimum requirements; and prohibited (Section 3) the sale of milk produced on a farm which possessed no such certificate. These provisions are now contained in Sections 16A-16I of Chapter 94, and Section 42 of Chapter 6, of the General Laws (Appendix D, *infra*, p. 134). Section 16A of Chapter 94 provides that "no person shall sell or offer or expose for sale milk produced on a dairy farm, for use or disposal elsewhere than on such farm, unless as to such farm a certificate of registration has been issued by the director under Section 16C and is in full force and effect."[41] Section 16C provides that no certificate shall be issued by the director until after an inspection which clearly shows satisfactory compliance with "the uniform minimum requirements for dairy farm inspection" established by the milk regulation board under the powers conferred upon it by General Laws, Chapter 6, Section 42. Since only a relatively small percentage of the milk used in the area originates in Massachusetts (R., Vol. II, 78, 134), inspection of farms outside as well as inside Massachusetts is necessary. And such annual inspection is made annually either by the director or by inspectors of munici-

[41] The only exception to the requirement for such a certificate is contained in Section 16H of the chapter, exempting farms in areas designated by the milk regulation board as qualified areas. But the board has never designated any such areas. (R. Vol. II, 178.)

pal boards of health whose report he accepts (see Economic Brief submitted at hearings on original order, pp. 82, 83; R. Vol. II, p. 6, par. 2, Appendix A, certified as original exhibit).

No matter where produced, therefore, no matter by whom distributed or sold, milk produced on a farm as to which there is no such certificate of registration is not legally entitled to be disposed of in the Commonwealth."[12] Violation of this provision subjects the offender to fine or imprisonment (Section 16I).

In thus establishing uniform standards of inspection and insuring the farmer's compliance with those minimum sanitary requirements by making necessary the issuance and possession of a certificate, this statute sought to check at the source the possibility of impurities in milk. The Commonwealth was not content simply to forbid the sale of impure or adulterated milk. Some measure of state supervision of the conditions on the farms on which milk was produced was thought necessary. Accordingly, minimum requirements of sanitation are laid down with which all farms supplying milk to be sold in Massachusetts must comply. And the sole and exclusive test of compliance is the possession of a certificate. It is immaterial that a farm may actually be clean and sanitary. Failure to have a certificate renders the milk unsellable. As Blue Sky Laws, designed to protect the public from fraudulent securities, forbid sales without a license regardless of the value of the particular

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[12]Clearly there is no question of the power of Massachusetts to prohibit the sale within its borders of milk produced on a farm not having the required certificate. The fact that the milk is produced outside of the Commonwealth is immaterial. *Mintz v. Baldwin*, 289 U. S. 346. In that case a state statute prohibiting the importation of cattle into the state unless certified by the chief sanitary officer of the state of origin to be free from disease was upheld as an inspection measure, "appropriate . . . to safeguard public health."

security, so this statute, designed to insure purity in milk, requires a certificate before milk, however wholesome or clean, can be sold. It follows, therefore, that milk produced on a farm as to which no certificate of registration is in effect is plainly not produced in conformity with the health requirements applicable to milk sold in the Boston market. Such milk is no more a sellable product than sub-standard or adulterated milk. The prohibition against its sale is equally absolute and unqualified.

C. The Market Administrator violated the provisions of the Amended Order by including in his computations milk produced by farmers not having the required certificate.

In each delivery period between August 1 and December 31, 1937, the Market Administrator included in his computation of the blended price milk delivered to handlers by persons who did not have the required certificate of registration (R. Vol. II, p. 177, par. 173) and made no attempt to exclude such milk (R. Vol. II, p. 176, par. 170). As we have just shown, such milk is clearly not produced in accordance with the applicable health requirements in Massachusetts. But the Administrator apparently proceeded on the theory that, if the *handler* to whose country plant the milk was delivered was licensed, under the provisions of General Laws, chapter 94, section 40, by local authorities of *any* city or town in the marketing area to sell milk in that city or town, it became unnecessary to inquire whether the farmer had a certificate of registration, or whether in any other respects the milk complied with the health regulations. A conscious effort was made by the Administrator to exclude any milk which was delivered to a country plant from which the handler had no such license to sell milk

(R. Vol. II, p. 174, pars. 163, 164). In short, the Administrator evolved his own test as to what the health regulations were. The test he adopted, we submit, rests upon a complete misapprehension of the Massachusetts system of regulating the sale of milk and is clearly erroneous.

We have pointed out that the Commonwealth has laid down general standards as to wholesomeness and purity of milk and has supplemented these by providing for inspection of the source from which milk is derived. It has, however, also vested in local municipal authorities the power to impose limitations upon the sale of milk within their own areas. By section 43 of chapter 94 of the General Laws (Appendix D, *infra*, p. 134), milk cannot be sold within any town without a permit from the local board of health, and such permit may contain reasonable conditions for protecting the public health. Before the provision requiring certificates of registration from the state was adopted in 1932, the local boards of health were authorized to issue such permits after inspection, "satisfactory to them" of "the place in which and the circumstances under which such milk is produced".[*] But after 1932, the possession of such certificate was made a prerequisite to obtaining a local board of health permit.[**] The local health authorities are still left with the power to issue permits subject to such further inspection as is satisfactory to them, and to any other reasonable requirements additional to the minimum laid down by the Commonwealth. *Brielman* v. *Commissioner of Public Health*, Mass. Adv. Sh. (1938) pp. 1741, 1743, 17 N. E. (2d) 187, 189: "Local boards of health retain all their powers under earlier

[*]Acts of 1914, Chapter 744, Sections 1-5; Gen. Laws, Chapter 94, Section 43, prior to amendments of 1932.

[**]Acts of 1932, c. 305, sec. 4, amending Gen. Laws, chapter 94, section 43.

laws and may make regulations more stringent than the general law."

In addition to these board of health permits, the statute also provides for the issuance, by the local milk inspector of a city or town, of licenses to dealers to engage in the occupation of dealing in milk in the municipality (Gen. Laws, chapter 94, section 40, quoted in R. Vol. II, 89, and printed in Appendix D, *infra*, p. 134) just as municipal authorities are empowered, by other statutes, to license hawkers and peddlers, hotels and inns, dance halls, or bowling alleys. As a matter of practice, municipal authorities in licensing dealers have stipulated that the dealer shall sell only milk delivered to certain of his plants which the authorities approve (R. Vol. II, p. 89, par. 30). The municipality by this means exercises a measure of supervision over the dealer's plant in which the milk is handled as, by the board of health permit, it attains a degree of control over the conditions under which milk is produced.

The system that the Commonwealth has set up governing the sale of milk is, therefore, twofold. General statutory requirements are established applicable to all milk sold in the state. In addition, local authorities are authorized and directed to regulate the sale of milk within their own municipality by licensing the dealer and, through the issuance of board of health permits, by licensing the actual milk sold. Under this scheme, before milk can be sold in any community, four things at least are necessary: (1) the producer must have a certificate of registration; (2) the milk must meet the general standards as to butterfat and solid content, and wholesomeness and purity laid down by the statutes; (3) the distributor must have a permit from the local board of health to sell that milk; and (4) the distributor must have a license from the local milk inspector to engage in the business of

selling milk in that community. No one of these requirements is a substitute for any other. They are not alternative but supplementary, and together make up a single and comprehensive system of regulation.

The Administrator, however, looked only to see whether the last requirement—possession by the handler of a license issued under section 40 of chapter 94—was complied with. But it is perfectly evident that possession of a license to engage in the business of selling milk, in a single city or town in the area, from a certain approved plant has no tendency at all to establish that the *milk* distributed from that plant complies with all the applicable health requirements and that any such milk can legally be sold either in that town or anywhere else in Massachusetts. A dealer's license simply permits the holder to engage in the business of selling milk in the particular municipality granting it. It has not, and is not intended to have, any further effect. All such licenses expressly provide that the licensee is authorized "to sell milk accordingly to law and the regulations" of the local health authorities "if the said law and regulations are complied with" (R. Vol. II, p. 89, par. 39). Possession by a dealer of a municipal license to distribute milk from certain approved plants could not possibly warrant him or his producers in disregarding all other regulations governing the sale of milk. Local authorities can no more set at naught the requirement of Section 16A of chapter 94 that all producers possess a certificate of registration, than the requirement that all milk contain a certain percentage of butterfat and solids, or the prohibition against the sale of adulterated or impure milk or milk from diseased or refuse-fed cows.

The test that the Market Administrator purported to follow in applying the definition of "producer" in the amended Order is, therefore, patently wrong. What the

Order required was that milk be *produced* in conformity with the health regulations applicable to milk sold in the Boston area. What the Administrator did was to determine whether the *handler* had a municipal license to sell milk. We submit that this was not, as the court below ruled, "a practical and satisfactory compliance with the Order" (R. Vol. I, 124).

D. Administrative difficulties in complying with the provisions of the Amended Order did not warrant the Market Administrator's violation of those provisions.

It is, of course, fundamental that a subordinate administrative officer is not warranted in disregarding limitations upon his authority or duties imposed upon him because it is difficult or inconvenient to comply. The requirements imposed by law may be unwise or unworkable. But he is not therefore free to re-fashion the law to suit his own conceptions of what shall be required of him. The remedy lies in resort to the lawmaker. If changes are necessary, they must be made by the authority which created the law. In this case, the law in question is the amended Order and the only person with power to change it is the Secretary, not the Market Administrator.

The court below found that, although records were kept of the certificates of registration issued to producers under sections 16A-I of chapter 94 of the General Laws (R. Vol. II, p. 176, par. 171), it was as a practical matter impossible for the Market Administrator to determine from records and information available to him whether the milk reported by particular handlers was produced by farmers who had such certificates (R. Vol. II, pp. 176, 177, par. 171). Some handlers it appeared were selling and distributing milk produced by farmers having no such certificates (R. Vol. II, p. 177, par. 172). Accord-

ingly, the Administrator abandoned the attempt to follow the directions of the amended Order and fashioned a different test which he believed was practical.

We submit that this course was improper. If practical difficulties precluded enforcement of the amended Order according to its terms, the only appropriate step that could be taken was to change these terms. Ultimate decision as to the necessity or wisdom of provisions which may hinder administration rests, not with the Market Administrator, but with the Secretary. If actual experience in operating under the amended Order as written showed the unworkability of the scheme, the Secretary alone had power to make the required alterations. And such alterations could be made only by amending the Order in the manner provided by the statute. Neither the Market Administrator's disregard of the terms of his authority, nor acquiescence by the Secretary therein, were enough to change the terms of the amended Order.

Moreover, if any difficulty in complying with those terms existed, an opportunity to correct that difficulty was presented to the Secretary before the present litigation was initiated. The very point here at issue was raised by the present petitioners in a petition filed by them with the Secretary, under the provisions of Section 8c(15)(A) of the Act[46] on September 9, 1937, shortly after the amended Order became effective. That petition sought,

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[46]Section 8c(15)(A) provides: "Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law."

among other things, suspension of the order pending elimination of milk alleged not to be eligible for inclusion in the pool (R. Vol. II, p. 221, par. 240). Although hearings were held on the petitions, and evidence presented, the Secretary never rendered a decision thereon (R. Vol. II, p. 221, par. 240). Had he complied with the mandate of the statute[46] and passed upon the questions raised, the administrative difficulties into which the Market Administrator fell and the consequent disregard of the amended Order's provisions would never have occurred. Those provisions could then have been amended, if necessary, to prescribe a different definition of "producer". Orders in other areas have differently phrased the requirement of compliance with applicable health regulations. The Order in the New York marketing area requires simply that the milk be delivered "at a plant which is approved by any health authority" for receiving milk.[47] The Order in the Cincinnati, Ohio, marketing area requires production in compliance with the applicable health regulations as "ap-

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[46]Section 8c(15)(A) provides that the Secretary "*shall* make a ruling upon the prayer of the petition" (italics ours). Unless the Secretary complies with this provision, the handler's right to judicial review, provided for in Section 8c(15)(B), is thwarted.

[47]Order Regulating Handling of Milk in the New York Metropolitan Marketing Area (3 Fed. Reg. 1945-1951), issued August 5, 1938. Article I, Section 1, provides:

> "The following terms shall have the following meanings:
>
> * * * * * *
>
> 5. "Producer" means any person who produces milk which is delivered to a handler at a plant which is approved by any health authority for the receiving of milk to be sold in the marketing area."

plied and enforced by proper authorities".[48] And the Order, issued in February, 1939, in Lowell-Lawrence, another marketing area in Massachusetts, abandons all attempt at requiring compliance with the Massachusetts health requirements.[49] Doubtless profiting from the experience of the Market Administrator under the instant amended Order, the Secretary has attempted to avoid similar difficulties of enforcement in other markets. But he has taken no action to change the plain command of the Amended Order here under consideration. The law as there written still stands. And the Administrator's failure to follow that command was, we submit, unjustified.

E. THE DECREE ORDERING PAYMENT OF IMPROPERLY COMPUTED SUMS IS ERRONEOUS.

The Market Administrator's failure to comply with the provisions of the amended Order affected the blended

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[48]Order Regulating Handling of Milk in Cincinnati, Ohio, Market Area (3 Fed. Reg. 969-973), issued April 27, 1938, effective May 1, 1938, Article I, Sec. 1 provides:

"The following terms shall have the following definitions:

* * * * * *

4. *Producer* means any person, who, in conformity with the health regulations as applied and enforced by the proper authorities, with respect to milk which is sold for consumption in the form of milk in the marketing area, produces milk and delivers it to a handler . . . ."

[49]Order Regulating the Handling of Milk in the Lowell-Lawrence, Massachusetts, Marketing Area (4 Fed. Reg. 601-606), issued February 6, 1939, effective February 12, 1939. Sec. 934.1 thereof provides:

"The following terms shall have the following meanings:

* * * * * *

(5) The term "producer" means any person who produces milk which is delivered to a receiving plant from which milk is shipped to or sold in the marketing area during any delivery period. . . . ."

price in every delivery period (R. Vol. II, p. 177, par. 173). In such periods, therefore, no producer received payment of the correct amount for his milk. And, consequently, no handler was billed the correct amount for equalization charges. For such charges vary in accordance with the changes in the blended price. If the blended price is increased, the equalization charges are lower (R. Vol. II, p. 194, par. 190). If it is decreased, they are correspondingly raised. The extent of the error has not been found; presumably it was great because the amount of milk wrongly included in the computations was substantial (R. Vol. II, p. 177, par. 172).

Yet it is these incorrectly computed amounts which the decree of the court below orders paid over to the Administrator. It follows that that decree is wrong. Of course, it will not do to say that, as in some instances the bills were too high and in others too low, the net effect of the errors may not have harmed the petitioners. That is purely a matter of conjecture. The burden is upon those who seek to compel payment to show what is owing. If the evidence establishes merely that some amount of money may or may not be due, the plaintiff has not made out his case.

The respondents sought to escape this obvious conclusion by suggesting in the court below that the petitioners, Hood and Noble, had no legal standing to raise questions as to errors in computation of the equalization payments (Plaintiffs' Proposed Conclusions of Law, No. 33, R. Vol. I, p. 85). They point out that those payments do not affect the handler's total financial obligation (R. Vol. II, p. 194, par. 191), because he must in any event pay the "value" of his milk—i.e. a sum based on the amount of his purchases multiplied by the Class I and Class II rates. Since he must always pay this total amount, it is said that he suffers no legal injury, whether

the Administrator's share of that amount is greater or less than it should be. But the Administrator has no right or title to any monies except equalization payments correctly computed under Article VIII, section 2, paragraph 3 of the amended Order. The Administrator has not proved his own claim to these sums. Nor can he recover in the right of Hood producers since, under the terms of the decree and of the amended Order, the equalization payments transferred to him are distributed not to those producers but to other handlers.

The error, moreover, cuts deeper. By the decree ordering payment of these miscomputed sums to the Administrator, not only are the handler petitioners compelled to pay money to one who is not entitled to it, but also the petitioner Branon, and the producers he represents, are deprived of their right under the order to be paid a blended price computed in accordance with the order. Some of the amounts ordered transferred to the Administrator may be due to them.

No question is involved here of the right of a handler to refuse to comply with a milk order entirely, simply because the Administrator has made incorrect mathematical computations. The vice in the administration here is fundamental. The delivery periods involved are past. The decree below forecloses forever the right of the handler petitioners to be relieved from payments not due to the Administrator and the right of the producer to be paid the correct blended price in accordance with the Order.

CONCLUSION

The decree of the District Court should be reversed.

Respectfully submitted,

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April, 1939

APPENDIX A

A monthly average of NEMPA composite prices during the post-war parity period, computed from the tabulation in R. Vol. II, pp. 103-109, is taken as representing the normal seasonal variation in prices to producers. An index of the normal seasonal variation of the price for each month from the price for August is determined by dividing the August price by the price for each month. Prices actually posted and paid by Hood during the first seven months of 1937 are taken from the plant notices (with the interpolation of a price for February) in R. Vol. III, pp. 210-215. The adjusted prices posted and paid are computed by applying the index of normal seasonal variation for each month to the actual price for that month. These statistics are summarized in the table below:

Month	*Composite Price Base Period*	*Index Normal Seasonal Variation*	*Price Posted and Paid*	*Adjusted Price Posted and Paid*
Jan.	$2.825	.967	$2.20	$2.127
Feb.	2.712	1.007	2.20	2.215
Mar.	2.609	1.047	2.10	2.199
Apr.	2.404	1.136	2.00	2.272
May	2.236	1.221	1.85	2.259
June	2.142	1.275	1.81	2.308
July	2.425	1.126	2.26	2.545
Aug.	2.731			

Average adjusted price $2.275

APPENDIX B

Section 8c(5)(F) provides that nothing in subsection (5) is intended or shall be construed to prevent a cooperative marketing association, qualified under the provisions of the "Capper-Volstead Act" and engaged in making collective sales or marketing of milk for the producer members thereof, from blending the net proceeds of all its sales in all markets, in all use classifications and making distribution thereof to its producers in accordance with the contract between the association and its producers.

The practical effect of this subparagraph (F) may be illustrated by a simple example. Assume an operating cooperative, such as Milton Cooperative, New England Dairies, Inc., United Farmers or others (R. Vol. II, pp. 112, 114), that is qualified under the provisions of the "Capper-Volstead Act" (R. Vol. II, p. 153, par. 118). It sells fluid milk either to handlers or at retail in competition with handlers. In so far as the cooperative sells to handlers it must sell at prices not less than those fixed pursuant to paragraph (A) of 8c(5).[50] Under amended Order No. 4 generally this is the Class I price.[51] In so far as it sells fluid milk at retail all such sales are classified as Class I sales under the amended Order.[52] These classifications are made pursuant to the authority vested in the Secretary by 8c(5)(A).[53] Thus the assumed co-

[50] 8c(5)(F) "*Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk."

[51] Appendix F, amended Order No. 4 Art. III, Sec. 2.

[52] Appendix F, Art. III, Sec. 1.

[53] "In the case of milk . . . orders . . . shall contain one or more of the following terms . . . (A) Classifying milk in accordance with the form in which or the purpose for which it is used . . ."

operative might well dispose of the bulk of its milk for Class I purposes, manufacturing the balance. The average of its Class I outlet might be in excess of the market average.

Except for the provisions in subparagraph (F) of section 8c(5), this cooperative would, like any other handler,[54] pay into the equalization pool under the provisions of subparagraph (C). It would pay the blended price to each member producer for the milk delivered by him, and since the average value of all of the milk received classified by its use at the fixed prices[55] is in excess of the blended price, it would pay the difference between the total payments to the producers and the total value to the Market Administrator.[56]

Thus, under the procedure outlined in subparagraphs (A), (B) and (C) of Sec. 8c(5), and as applied in amended Order No. 4, handlers whose use value of milk received is greater than the average use value in the entire market are not permitted to retain the net proceeds of all their sales. The equalization payment to the Market Administrator is from the net proceeds and diminishes them to that extent.[57]

To relieve qualified cooperatives from the burden of this obligation, subparagraph (F) specifically directs that nothing in Section 8c(5) is intended or shall be construed to prevent a cooperative from blending the net proceeds of all its sales and making distribution thereof to its

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[54]Art. 1, Sec. 1, Cl. 6.

[55]Art. IV, Secs. 1, 2 and 3.

[56]Art. VIII, Sec. 1.

[57]This may involve substantial amounts. Thus the Hood Company alone in seventeen months was obligated to pay $1,412,280.83 to the Market Administrator (R. Vol. I, p. 131). This, if the Hood Company were a cooperative, would have been distributed among its 3,186 farmers (R. Vol. II, p. 212), amounting approximately on the average to $445 per farmer.

members. "Net proceeds of all its sales" means the aggregate received for the sale of the milk less the costs of marketing, processing, etc. Any other construction would require an interpretation of subparagraph (F) as follows: ". . . net proceeds of all its sales . . . subject to such adjustments as may be required by subparagraph (C) of this section". Obviously such an interpretation would defeat the plain meaning of the words of subparagraph (F) and in effect render it a vain and meaningless provision.

This construction is confirmed by the legislative history. The Committees on Agriculture in both houses of Congress in commenting on this subparagraph said,

> "A specific provision is included in this proposed subsection safeguarding the right of cooperative marketing associations qualified under the Capper-Volstead Act to make distribution of the proceeds of milk sold by them to their members in accordance with the contracts between the cooperatives and their members." 74th Congress, House of Representatives, Report No. 1241, Senate Report No. 1011.

During the debate in the Senate the future status of cooperatives was discussed. Senator Murphy of Iowa, in charge of the milk sections of the bill for the committee, in response to a question by Senator Copeland as to whether, under the provisions of Section 8c(5), a cooperative might "return to their members the net proceeds of their sales regardless of what they may be," said,

> "Furthermore, in the case of the particular producers to whom the Senator refers, there is not any obligation upon them to come in under this provision at all. They are free to stay out. If they do not wish to come in and have their condition bettered, and a proper price paid them for their milk, this is a matter

of their election. It will not be imposed upon them." Cong. Rec. 74th Cong. 1st Sess. p. 11139.

Thus, the effect of this provision is to make it optional with the qualified cooperatives to join market-wide equalization as established under amended Order No. 4 or not. Even subparagraph C of Section 8c(5) would not, standing alone, require a cooperative to equalize for this section refers only to milk purchased. Cooperatives do not purchase milk. They act as the marketing agent of their members (see sample contracts between cooperatives and their members, R. Vol. III, pp. 2-48).

This favored treatment of cooperatives is consistent with a long-established policy of Congress and state legislatures in varied efforts to solve the national agricultural problem. The cooperative movement has been fostered as a system of establishing orderly marketing conditions and prices for agricultural commodities. The system has so developed as to merit recognition. The method of regulating prices established in the challenged legislation although novel was obviously designed to supplement and protect the advantages previously achieved through the cooperative movement.[58] Scrupulous effort was made to preserve and in no way interrupt the successful accomplishment of cooperatives.

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[58]The Senate Committee on Agriculture in reporting the bill containing the sections here discussed said: "The operations of cooperative marketing associations will be reinforced by these sections, which will assure the cooperation of processors and distributors in programs intended to raise farm prices" (74th Cong. 1st Sess. Senate Report No. 1011). See also 74th Cong. 1st Sess. H. R. Report No. 1241.

APPENDIX C

Between the promulgation of Order No. 4 and the promulgation of the amendments to Order No. 4 the Department of Agriculture in February 1937 published a pamphlet entitled *"Wholesale Prices Received by Farmers for Whole Milk 1909-1936"*. The preface states that the statistics were compiled from field investigations lasting until August 1936, that the earlier series were inadequate and that this series was constructed "for use in developing marketing agreements". (R. Vol. II, p. 207, par. 216; Exh. 18, R. Vol. II, pp. 201-209).

It is impossible to say whether the Secretary would have considered these statistics satisfactory. The compelling inference from his failure to make under Sections 8c(17) and 8e the required finding and proclamation concerning pre-war statistics at the time of the amendments to Order No. 4, is that he never considered them. We do not contend that he would have been compelled to find them satisfactory. But in view of their announced purpose he might well have considered them to be so.

If the Secretary had found these statistics satisfactory, he could have then made the following calculations from them. From the pre-war prices for each state, averages would be computed. They are:

State	*Pre-War Average*
Maine	$1.80
New Hampshire	1.95
Vermont	1.49
Massachusetts	2.46

To calculate the parity price for August, 1937 for each state we adopt from the statistics used by the Secretary the percentage increase in the national index number of articles bought by farmers. (R. Vol. I, p. 207, par. 215; Exh. 16, R. Vol. II, pp. 162-163). The index number

rose 32%; consequently the parity price for each state would be:

State	*August 1937 parity*
Maine	$2.376
New Hampshire	2.574
Vermont	1.967
Massachusetts	3.247

Since the order fixes prices in relation to the milkshed as a whole, an average for the milkshed could be calculated by weighting the state parity prices according to the present state participation in the Boston market. (R. Vol. I, p. 78). This method of weighting would lead to a parity price equal to the average sum per hundredweight which would be paid if farmers in each state received a parity price for that state. It would give $2.25 as the uniform parity price for whole milk. A similar series of computations from the same statistics would show that the parity price based on the post-war level is seven cents higher, or $2.32.

We do not contend that the Secretary should have used those pre-war figures for parity computations. He might have found them unsatisfactory. However, he had already used whole-milk prices for the purpose of fixing the class price in the Boston area.[59] Furthermore, the whole-milk prices here referred to were compiled for the express purpose of formulating marketing agreements, which always accompany orders issued under the Act. It would have been possible and not unreasonable, therefore, for the Secretary to have used an average parity price computed from these pre-war figures as the price

[59]The Secretary used the pre-war base period for the purposes of an earlier license regulating the handling of milk in the Boston area, (R. Vol. II, pp 207-209, par. 218). Milk was not sold under the classified price system at that time, (R. Vol. II, p. 123, par. 78), yet the license fixed class prices.

goal toward which he would mold the provisions of an order. Consequently, the failure to make the required Section 8e finding and proclamation indicates that the Secretary overlooked statistics for the pre-war period which he could have found satisfactory, and which in that event he would have been compelled to use.

APPENDIX D

Mass. Gen. Laws (Ter. Ed. 1932), Chapter 6.

§42. *Milk Regulation Board.* There shall be a milk regulation board, consisting of the commissioner of agriculture, the commissioner of public health and the attorney general, ex-officiis. Said board, after holding a public hearing in the commonwealth, notice of which shall have been given, at least two weeks prior to the date of the hearing, by publication in each county in a newspaper of general circulation therein, shall establish and promulgate, and may from time to time amend, modify, repeal or suspend, rules and regulations, including uniform minimum requirements, for the inspection of dairy farms producing milk for distribution, sale or exchange in the commonwealth. Said board shall provide suitable uniform cards for the classification of dairy farms producing milk for said purposes, and shall furnish suitable plans, information and advice relative to the construction, installation and development of facilities for improving the quality of milk.

Mass. Gen. Laws (Ter. Ed. 1932), Chapter 94.

§16. *Definitions.* For the purposes of sections sixteen to sixteen I, inclusive, the following words shall have the following meanings:

"Board", the milk regulation board, established under section forty-two of chapter six.

"Dairy farm", a place or premises where more than two cows are kept and a part or all the milk produced thereon is sold or delivered for sale to any person.

"Director", the director of the division of dairying and animal husbandry of the department of agriculture.

For the purposes of sections sixteen to sixteen I, inclusive, the director shall act under the supervision and control of the board. Said sections shall not apply to cream complying with the proper Massachusetts legal standard for cream established by section twelve.

§16A. *Milk Not to Be Sold without Certificate of Registration.* Except as provided in section sixteen H, no person shall sell or offer or expose for sale milk produced on a dairy farm, for use or disposal elsewhere than on such farm, unless as to such farm a certificate of registration has been issued by the director under section sixteen C and is in full force and effect; provided, that one who purchases such milk from a dealer registered under section sixteen F and sells or offers or exposes the same for sale shall not be deemed to have violated this section unless he knows or has reasonable ground to know that the same was not produced on a farm as to which such a certificate has been issued.

§16B. *Applications for Registration.* Applications for the registration of dairy farms under section sixteen C shall be made upon blanks furnished by the director and shall contain, in addition to such other information as may be required by the director, a statement of the name, place of residence and business address of the applicant, the amount of milk produced on his dairy farm during the calendar month last preceding the date of application, the number of dairy cows more than two years of age and the number of heifers less than two years of age kept on said dairy farm during said month, the names and business addresses of dealers, distributors and wholesale purchasers who receive milk from said dairy farm, together with a statement of the estimated amount of milk to be supplied each dealer, distributor and wholesale purchaser during such period as may be

designated by the director. Every statement shall be verified by oath or written declaration that it is made under the penalties of perjury.

§16C. *Issuance and Renewal of Certificates.* The director may issue, and may from time to time renew, certificates of registration for dairy farms. No certificate of registration for a dairy farm shall be issued or renewed by the director, except as hereinafter provided, until he has made or caused to be made at least one inspection of said farm within one year prior thereto, and unless said inspection clearly indicates a satisfactory compliance with the uniform minimum requirements for dairy farm inspection established under section forty-two of chapter six. The director shall accept the inspection reports of milk inspectors and agents of local boards of health within the commonwealth in respect to dairy farms located within or without the commonwealth which have been inspected by them, and, if such reports state that such dairy farms have complied with said minimum requirements, certificates of registration shall thereupon issue. Each dairy farm registered by the director shall receive a numbered certificate of registration which shall, while in effect, be posted in a conspicuous place at all times on said farm. Each certificate of registration of a dairy farm located in the commonwealth shall expire on the following June thirtieth, and each certificate of registration of a dairy farm located outside the commonwealth shall expire on such date as the board shall determine, but not within one year from its date of issue. Annual applications for renewal of certificates shall be made not less than thirty days prior to the expiration date on forms furnished by the director. If a certificate of registration is lost, duplicate copies may be obtained from the director at a cost of fifty cents each.

§16D. *Refusal, Revocation or Suspension of Certificate.* A certificate of registration of a dairy farm may be refused, suspended or revoked by the director for failure to comply with such rules, regulations and uniform minimum requirements; provided, that before any such suspension or revocation becomes effective, or upon such refusal, the parties concerned shall be given a hearing before the director or a person designated by him for such purpose. The parties concerned shall be given a reasonable notice of the hearing, specifying the day, hour and place thereof and accompanied by a statement of the alleged failure to comply, or the reasons for such refusal. The director may allow the parties concerned a period of not more than thirty days from the date of the hearing within which to make a substantial compliance with said rules, regulations and uniform minimum requirements. An appeal from the decision of the director may be taken to the board, whose decision shall be final. Notice of the refusal, suspension or revocation of a certificate of registration shall be given to each distributor or dealer of record handling milk produced on such dairy farm, and to the board of health of each town of record where milk produced on such dairy farm is sold, offered or exposed for sale. In case of emergency, the department of public health may suspend or revoke any such certificate of registration.

§16H. *Areas for Milk Supply.* The board shall designate, as qualified areas for additional milk supply, states, or parts thereof, wherein milk is produced on dairy farms subject to inspection substantially similar to that required by the board in this commonwealth and whose geographical location will reasonably guarantee the delivery of milk of a satisfactory quality for the Massachusetts market. Dairy farms in said states, or parts there-

of, shall thereupon be deemed to be registered within the meaning of sections sixteen to sixteen I, inclusive, and shall be entitled to certificates of registration without further inspection; provided, that no such certificate shall be granted for such a dairy farm if, upon inspection, the director shall deem that satisfactory compliance with the Massachusetts uniform minimum requirements for dairy farm inspection does not exist thereat. Any producer of milk within any state or part thereof, not designated as a qualified area as aforesaid, shall, within a period of one year after his application therefor, be entitled to have his dairy farm inspected by the director, or by an agency designated by the director, and shall not be refused a certificate of registration for any reason other than failure to comply with said Massachusetts uniform minimum requirements or inability for geographical reasons to deliver milk of a satisfactory quality in the Massachusetts market. If, at any time, the board finds that a shortage of milk exists or is threatened anywhere within the commonwealth, temporary certificates of registration shall, without inspection, be issued for non-registered dairy farms in such numbers and in such areas as the board may deem wise, and any such certificate may be revoked by the board.

§16I. *Penalty for Violation.* Any person violating any provision of sections sixteen to sixteen F, inclusive, shall for the first offence be punished by a fine of not more than one hundred dollars; and for any subsequent offence shall be punished by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment for not more than three months, or both.

Mass. Acts of 1914, Chapter 744.

SECTION 1. It shall be unlawful for any producer of milk or dealer in milk to sell or deliver for sale in any

city or town in the commonwealth any milk produced or dealt in by him without first obtaining from the board of health of such city or town a permit authorizing such sale or delivery. Said boards of health are hereby authorized to issue such permits after an inspection, satisfactory to them, of the place in which and of the circumstances under which such milk is produced, has been made by them or by their authorized agent. Any permit so granted may contain such reasonable conditions as said board may think suitable for protecting the public health and may be revoked for failure to comply with any of such conditions. No charge shall be made to the producer for the permit or for the inspection of the dairy where the milk is produced.

Mass. Acts of 1932, Chapter 305.

SECTION 4. Said chapter ninety-four, as amended in section forty-three by chapter one hundred and twenty-two of the acts of nineteen hundred and twenty-four, is hereby further amended by striking out said section and inserting in place thereof the following:—*Section* 43. No producer of milk shall sell or deliver for sale in any town any milk produced or dealt in by him without first obtaining from the board of health of such town a permit authorizing such sale or delivery. Said board of health may issue such permit after an inspection of the milk, and of the place where and the circumstances under which it is produced and handled, has been made by it or its authorized agent, but no producer shall be entitled to such a permit unless, as to the dairy farm producing such milk, a certificate of registration has been issued by the director under section sixteen C and is in full force and effect; provided, that no such certificate shall be required for the production or sale of cream complying with the proper legal standard for cream established

by section twelve or milk produced elsewhere than at a dairy farm, as defined in section sixteen.

SECTION 5. Notwithstanding the provisions of this act, any person who, upon its effective date, was producing milk for sale or distribution within the commonwealth, under a permit issued by a local board of health in the commonwealth, may continue to supply such milk for sale or distribution during a period not to exceed eighteen months from said effective date pending the issuance or refusal to issue a certificate of registration by the director of the division of dairying and animal husbandry of the department of agriculture under section sixteen C of chapter ninety-four of the General Laws, inserted by section three of this act, unless said permit is sooner revoked as provided by law.

Mass. Gen. Laws (Ter. Ed. 1932), Chapter 94.

§40. *License to Sell Milk, etc.* No person, except a producer selling milk to other than consumers, or selling not more than twenty quarts per day to consumers, shall deliver, exchange, expose for sale or sell or have in his custody or possession with intent so to do any milk, skimmed milk or cream in any town where an inspector of milk is appointed, without obtaining from such inspector a license which shall contain the number thereof, the name, place of business, residence, number of vehicles used by the licensee and the name of each driver or other person employed by him in carrying or selling milk. A license issued to a partnership or corporation shall be issued in the business name of said partnership or corporation and shall contain the names in full of the partners and managers of said partnership or officers of said corporation. The license shall, for the purposes of sections forty to forty-two, inclusive, be conclusive evidence

of ownership and shall not be sold, assigned or transferred. Whoever in such a town, engages in the business of selling milk, skimmed milk or cream from any vehicle shall display conspicuously on the outer side of each vehicle so used, his license number in figures not less than one and one half inches in height, and the name and place of business of the licensee in gothic letters not less than one and one half inches in height. Whoever in such town engages in the business of selling milk, skimmed milk or cream in a store, booth, stand or market shall have his license conspicuously posted therein.

§43. *Permits for Sale, etc., of Milk; Penalty.* No producer of milk shall sell or deliver for sale in any town any milk produced or dealt in by him without first obtaining from the board of health of such town a permit authorizing such sale or delivery. Said board of health may issue such permit after an inspection of the milk, and of the place where and the circumstances under which it is produced and handled, has been made by it or its authorized agent, but no producer shall be entitled to such a permit unless, as to the dairy farm producing such milk, a certificate of registration has been issued by the director under section sixteen C and is in full force and effect; provided, that no such certificate shall be required for the production or sale of cream complying with the proper legal standard for cream established by section twelve or milk produced elsewhere than at a dairy farm, as defined in section sixteen.

Any permit so granted may contain such reasonable conditons as said board deemed suitable for protecting the public health, and may be revoked for failure to comply with any of such conditions. After a permit has been revoked, it may be reissued in the same manner in which the original permit was issued. The board revoking or re-

issuing said permit shall immediately send notice thereof to the department of public health, which may enforce this provision. The department shall at once inform the board of health of any other town where, in its judgment, milk produced by the person to whom the permit relates would be likely to be sold or delivered for sale, and it shall also give notice of such revocation or reissue to any dealer in milk who in its judgment would be likely to purchase milk from such person; and after receipt of notice of revocation no dealer so notified shall sell or offer for sale such milk. If the board of health of any town refuses to issue a permit under this section or a permit previously issued is revoked by it, an appeal may be taken to the said department, whose decision shall be final. Violation of any provision of this section shall be punished by a fine of not more than one hundred dollars.

Appendix E

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION

Division of Marketing and Marketing Agreements

ANNOTATED COMPILATION

OF

AGRICULTURAL MARKETING AGREEMENT ACT OF 1937

REENACTING, AMENDING, AND SUPPLEMENTING THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1937

PREFATORY NOTE

This compilation is intended to indicate the present status of legislation by Congress relating to marketing agreements and orders regulating the handling of agricultural commodities in interstate and foreign commerce. The Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (Public, No. 137—75th Congress—Chap. 296, 1st Session), reenacted and amended certain provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders. Related legislation enacted prior to June 3, 1937, is given in the compilation known as "Annotated Compilation of the Agricultural Adjustment Act, as Amended, and Acts Relating Thereto at the Close of the First Session of the Seventy-Fourth Congress, August 26, 1935"; Superintendent of Documents, Washington, D. C.

Throughout the text of this compilation, bold face type is used for the language of the Agricultural Marketing Agreement Act of 1937; light face type is used for the language of the Agricultural Adjustment Act, as amended, as reenacted by the Agricultural Marketing Agreement Act of 1937; italics are used for amendments made by section 2 of the Agricultural Marketing Agreement Act of 1937 to the Agricultural Adjustment Act, as amended.

The provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are not set out haec verba. They are, however, incorporated in the body of the provisions of the Agricultural Adjustment Act, as amended, which they amend. References to the amendatory provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are contained in the annotations.

ANNOTATED COMPILATION OF AGRICULTURAL MARKETING AGREEMENT ACT OF 1937 REENACTING, AMENDING AND SUPPLEMENTING THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED [1]

AN ACT

To reenact and amend provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the following provisions of the Agricultural Adjustment Act, as amended, not having been intended for the control of the production of agricultural commodities, and having been intended to be effective irrespective of the validity of any other provision of that act are expressly affirmed and validated, and are reenacted without change except as provided in section 2:

(a) Section 1 (relating to the declaration of emergency);

DECLARATION

It is hereby declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.[2]

(b) Section 2 (relating to declaration of policy);

DECLARATION OF POLICY

SEC. 2. It is hereby declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such *orderly marketing conditions for agricultural commodities in interstate commerce as will establish* [3] prices to farmers at a level that will give agricultural commodities a purchasing power with respect

[1] For annotations to the Agricultural Adjustment Act, as amended; for provisions of that act not reenacted by the provisions of the Agricultural Marketing Agreement Act of 1937; and for other acts of Congress relating both to the Agricultural Adjustment Act, as amended, and to the Agricultural Marketing Agreement Act of 1937, see "Annotated Compilation of Agricultural Adjustment Act as Amended and Acts Relating Thereto at the Close of the First Session of the 74th Congress, August 26, 1935"; Superintendent of Documents, Washington, D. C.

[2] As amended by sec. 2 (a) of the Agricultural Marketing Agreement Act of 1937. The text of sec. 1 of the Agricultural Adjustment Act, as amended, was as follows:

"DECLARATION OF EMERGENCY

"That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act."

[3] The italicized words were substituted, by sec. 2 (b) of the Agricultural Marketing Agreement Act of 1937, in lieu of the words: "balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish".

to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period; and, in the case of all commodities for which the base period is the pre-war period, August 1909 to July 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period. The base period in the case of all agricultural commodities except tobacco and potatoes shall be the pre-war period, August 1909–July 1914. In the case of tobacco and potatoes, the base period shall be the postwar period, August 1919–July 1929.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(c) Section 8a (5), (6), (7), (8), and (9) relating to violations and enforcement;

SEC. 8a (5) Any person willfully exceeding any quota or allotment fixed for him under this title by the Secretary of Agriculture, and any other person knowingly participating, or aiding in the exceeding of said quota or allotment, shall forfeit to the United States a sum equal to three times the current market value of such excess, which forfeiture shall be recoverable in a civil suit brought in the name of the United States.

(6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating [1] any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts.

(7) Upon the request of the Secretary of Agriculture, it shall be the duty of the several district attorneys of the United States, in their respective districts, under the directions of the Attorney General, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in, or pursuant to, this title. Whenever the Secretary, or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe that any handler has violated, or is violating, the provisions of any order or amendment thereto issued pursuant to this title, the Secretary shall have power to institute an investigation and, after due notice to such handler, to conduct a hearing in order to determine the facts for the purpose of referring the matter to the Attorney General for appropriate action.

(8) The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this title or now or hereafter existing at law or in equity.

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[1] The following was deleted by section 2 (c) of the Agricultural Marketing Agreement Act of 1937: ", the provisions of this section, or of".

(9) The term "person" as used in this title includes an individual, partnership, corporation, association, and any other business unit.

(d) Section 8b (relating to marketing agreements);

SEC. 8b. In order to effectuate the declared policy of this title, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: Provided, That no such agreement shall remain in force after the termination of this Act. For the purpose of carrying out any such agreement the parties thereto shall be eligible for loans from the Reconstruction Finance Corporation under section 5 of the Reconstruction Finance Corporation Act. Such loans shall not be in excess of such amounts as may be authorized by the agreements.

(e) Section 8c (relating to orders);

ORDERS

SEC. 8c. (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

COMMODITIES TO WHICH APPLICABLE

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except products of naval stores), or to any regional, or market classification of any such commodity or product: Milk, fruits (including pecans and walnuts but not including apples and not including fruits, other than olives, for canning), tobacco, vegetables (not including vegetables, other than asparagus, for canning) soybeans and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin).

NOTICE AND HEARING

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

FINDING AND ISSUANCE OF ORDER

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity.

TERMS—MILK AND ITS PRODUCTS

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: Provided, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their *marketings*[5] of milk during a representative period of time.

[5] The word "production" was deleted and the word "marketings" was substituted by section 2 (d) of the Agricultural Marketing Agreement Act of 1937.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection (5).

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefore from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act", engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

TERMS—OTHER COMMODITIES

(6) In the case of fruits (including pecans and walnuts but not including apples and not including fruits, other than olives, for canning) and their products, tobacco and its products, vegetables (not including vegetables, other than asparagus, for canning) and their products, soybeans and their products, and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin), orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size,

or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof,

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts [6] sold by such producers in such prior period as the Secretary determines to be representative, or upon the current *quantities available for sale by* [7] such producers, or both, to the end that the total quantity thereof to be purchased or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing, or providing for the establishment of, reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

TERMS COMMON TO ALL ORDERS

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

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[6] The words "produced or" were deleted by section 2 (e) of the Agricultural Marketing Agreement Act of 1937.

[7] The italicized words were substituted, by section 2 (e) of the Agricultural Marketing Agreement Act of 1937, in lieu of the words: "production or sales of".

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph (C) shall be deemed to be acting in an official capacity, within the meaning of section 10 (g) of this title, unless such person receives compensation for his personal services from funds of the United States.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order.

ORDERS WITH MARKETING AGREEMENT

(8) Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 8b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection (8) shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: Provided, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of

such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

ORDERS WITH OR WITHOUT MARKETING AGREEMENT

(9) Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture, with the approval of the President, determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this title with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such

commodity sold within the marketing area specified in such marketing agreement or order.

MANNER OF REGULATION AND APPLICABILITY

(10) No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this title prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement.

REGIONAL APPLICATION

(11) (A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this title.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

COOPERATIVE ASSOCIATION REPRESENTATION

(12) Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

RETAILER AND PRODUCER EXEMPTION

(13) (A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this title shall be applicable to any producer in his capacity as a producer.

VIOLATION OF ORDER

(14) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: Provided, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15).

PETITION BY HANDLER AND REVIEW

(15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States (including the Supreme Court of the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 8a (6) of this title. Any proceedings brought pursuant to section 8a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

TERMINATION OF ORDERS AND MARKETING AGREEMENTS

(16) (A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this title, terminate or suspend the operation of such order or such provision thereof.

(B) The Secretary shall terminate any marketing agreement entered into under section 8b, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided*, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) The termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

PROVISIONS APPLICABLE TO AMENDMENTS

(17) The provisions of this section, section 8d, and section 8e applicable to orders shall be applicable to amendments to orders: *Provided*, That notice of a hearing upon a proposed amendment to any order issued pursuant to section 8c, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof.

Milk Prices

(18) *The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 2 and section 8e, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices which it is declared to be the policy of Congress to establish in section 2 and section 8e shall, for the purposes of such agreement, order, or amendment, be such level as will reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand, for milk or its products in the marketing area to which the contemplated mar-*

keting agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period as determined pursuant to section 2 and section 8c are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, making adjustments in such prices.[8]

PRODUCER REFERENDUM

(19) *For the purpose of ascertaining whether the issuance of an order is approved or favored by producers, as required under the applicable provisions of this title, the Secretary may conduct a referendum among producers. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12).*[9]

(f) Section 8d (relating to books and records);

BOOKS AND RECORDS

SEC. 8d. (1) All parties to any marketing agreement, and all handlers subject to an order, shall severally, from time to time, upon the request of the Secretary, to furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effectuated the declared policy of this title, and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from the anti-trust laws. Such information shall be furnished in accordance with forms of reports to be prescribed by the Secretary. For the purpose of ascertaining the correctness of any report made to the Secretary pursuant to this subsection, or for the purpose of obtaining the information required in any such report, where it has been requested and has not been furnished, the Secretary is hereby authorized to examine such books, papers, records, copies of income-tax reports, accounts, correspondence, contracts, documents, or memoranda, as he deems relevant and which are within the control (1) of any such party to such marketing agreement, or any such handler, from whom such report was requested or (2) of any person having, either directly or indirectly, actual or legal control of or over such party or

[8] This italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement Act of 1937.

[9] This italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement Act of 1937.

such handler or (3) of any subsidiary of any such party, handler, or person.

(2) Notwithstanding the provisions of section 7, all information furnished to or acquired by the Secretary of Agriculture pursuant to this section shall be kept confidential by all officers and employees of the Department of Agriculture and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United States is a party, and involving the marketing agreement or order with reference to which the information so to be disclosed was furnished or acquired. Nothing in this section shall be deemed to prohibit (A) the issuance of general statements based upon the reports of a number of parties to a marketing agreement or of handlers subject to an order, which statements do not identify the information furnished by any person, or (B) the publication by direction of the Secretary, of the name of any person violating any marketing agreement or any order, together with a statement of the particular provisions of the marketing agreement or order violated by such person. Any such officer or employee violating the provisions of this section shall upon conviction be subject to a fine of not more than $1,000 or to imprisonment for not more than one year, or to both, and shall be removed from office.

(g) Section 8e (relating to determination of base period);

DETERMINATION OF BASE PERIOD

SEC. 8e. In connection with the making of any marketing agreement or the issuance of any order, if the Secretary finds and proclaims that, as to any commodity specified in such marketing agreement or order, the purchasing power during the base period specified for such commodity in section 2 of this title cannot be satisfactorily determined from available statistics of the Department of Agriculture, the base period, for the purposes of such marketing agreement or order, shall be the post-war period, August 1919–July 1929, or all that portion thereof for which the Secretary finds and proclaims that the purchasing power of such commodity can be satisfactorily determined from available statistics of the Department of Agriculture.

(h) Section 10 (a), (b) (2), (c), (f), (g), (h), and (i) (miscellaneous provisions);

MISCELLANEOUS

SEC. 10. (a) The Secretary of Agriculture may appoint such officers and employees, subject to the provisions of the Classification Act of 1923 and Acts amendatory thereof, and such experts as are necessary to execute the functions vested in him by this title; and the Secretary may make such appointments without regard to the civil service laws or regulations: Provided, That no salary in excess of $10,000 per annum shall be paid to any officer, employee, or expert of the Agricultural Adjustment Administration, which the Secretary shall establish in the Department of Agriculture for the administration of the functions vested in him by this title: And provided

further, That the State Administrator appointed to administer this Act in each State shall be appointed by the President, by and with the advice and consent of the Senate. Title II of the Act entitled "An Act to maintain the credit of the United States Government", approved March 20, 1933, to the extent that it provides for the impoundment of appropriations on account of reductions in compensation, shall not operate to require such impoundment under appropriations contained in this Act.

(b) (2) [10] Each order issued by the Secretary under this title shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find will necessarily be incurred by such authority or agency, during any period specified by him, for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. Any such authority or agency may maintain in its own name, or in the names of its members, a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses. The several District Courts of the United States are hereby vested with jurisdiction to entertain such suits regardless of the amount in controversy.

(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title.[11] Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

(f) The provisions of this title shall be applicable to the United States and its possessions, except the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam; except that, in the case of sugar beets and sugarcane, the President, if he finds it necessary in order to effectuate the declared policy of this Act, is authorized by proclamation to make the provisions of this title applicable to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and/or the island of Guam.[12]

(g) No person shall, while acting in any official capacity in the administration of this title, speculate, directly or indirectly, in any agricultural commodity or product thereof, to which this title applies, or in contracts relating thereto, or in the stock or membership interests of any association or corporation engaged in handling,

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[10] Sec. 10 (b) (2) of the Agricultural Adjustment Act, as amended.

[11] Sec. 2 (g) of the Agricultural Marketing Agreement Act of 1937 deletes the following: ", including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto".

[12] Sec. 2 (h) of the Agricultural Marketing Agreement Act of 1937 deletes the sentence: "The President is authorized to attach by Executive order any or all such possessions to any internal-revenue collection district for the purpose of carrying out the provisions of this title with respect to the collection of taxes".

processing, or disposing of any such commodity or product. Any person violating this subsection shall upon conviction thereof be fined not more than $10,000 or imprisoned not more than two years, or both.

(h) For the efficient administration of the provisions of part 2 of this title, the provisions, including penalties, of sections 8, 9, and 10 of the Federal Trade Commission Act, approved September 26, 1914, are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of this title and to any person subject to the provisions of this title, whether or not a corporation. Hearings authorized or required under this title shall be conducted by the Secretary of Agriculture or such officer or employee of the Department as he may designate for the purpose. The Secretary may report any violation of any agreement entered into under part 2 of this title to the Attorney General of the United States, who shall cause appropriate proceedings to enforce such agreement to be commenced and prosecuted in the proper courts of the United States without delay.

(i) The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 8c) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: *Provided*, That information furnished to the Secretary of Agriculture pursuant to section 8d (1) hereof shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 8d (2) hereof.

(j) *The term "interstate or foreign commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purpose of this Act (but in nowise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within*

the State and the shipment outside the State of the products so processed. Agricultural commodities or products thereof normally in such current of interstate or foreign commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. As used herein, the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nations.[13]

(i) Section 12 (a) and (c) (relating to appropriation and expense);

APPROPRIATION

SEC. 12. (a) There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000 to be available to the Secretary of Agriculture for administrative expenses under this title and for payments authorized to be made under section 8. Such sum shall remain available until expended.

To enable the Secretary of Agriculture to finance, under such terms and conditions as he may prescribe, surplus reductions[14] with respect to the dairy- and beef-cattle industries, and to carry out any of the purposes described in subsections (a) and (b) of this section (12) and to support and balance the market for the dairy and beef cattle industries, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $200,000,000: Provided, That not more than 60 per centum of such amount shall be used for either of such industries.

(c) The administrative expenses provided for under this section shall include, among others, expenditures for personal services and rent in the District of Columbia and elsewhere, for law books and books of reference, for contract stenographic reporting services, and for printing and paper in addition to allotments under the existing law. The Secretary of Agriculture shall transfer to the Treasury Department, and is authorized to transfer to other agencies, out of funds available for administrative expenses under this title, such sums as are required to pay administrative expenses incurred and refunds made by such department or agencies in the administration of this title.

(j) Section 14 (relating to separability);

SEPARABILITY OF PROVISIONS

SEC. 14. If any provisions of this title is declared unconstitutional, or the applicability thereof to any person, circumstance, or commodity is held invalid the validity of the remainder of this title and the applicability thereof to other persons, circumstances, or commodities shall not be affected thereby.

(k) Section 22 (relating to imports);

IMPORTS

SEC. 22. (a) Whenever the President has reason to believe that any one or more articles are being imported into the United States

[13] This italicized subsection was added by sec. 2 (i) of the Agricultural Marketing Agreement Act of 1937.

[14] Sec. 2 (j) of the Agricultural Marketing Agreement Act of 1937 deletes the words: "and production adjustments".

under such conditions and in sufficient quantities as to render or tend to render ineffective or materially interfere with any program or operation undertaken, or to reduce substantially the amount of any product processed in the United States from any commodity subject to and with respect to which any program is in operation, under this title, or the Soil Conservation and Domestic Allotment Act, as amended, he shall cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this section to determine such facts. Such investigation shall be made after due notice and opportunity for hearing to interested parties and shall be conducted subject to such regulations as the President shall specify.

(b) If, on the basis of such investigation and report to him of findings and recommendations made in connection therewith, the President finds the existence of such facts, he shall by proclamation impose such limitations on the total quantities of any article or articles which may be imported as he finds and declares shown by such investigation to be necessary to prescribe in order that the entry of such article or articles will not render or tend to render ineffective or materially interfere with any program or operation undertaken, or will not reduce substantially the amount of any product processed in the United States from any commodity subject to and with respect to which any program is in operation, under this title or the Soil Conservation and Domestic Allotment Act, as amended: Provided, That no limitation shall be imposed on the total quantity of any article which may be imported from any country which reduces such permissible total quantity to less than 50 per centum of the average annual quantity of such article which was imported from such country during the period from July 1, 1928, to June 30, 1933, both dates inclusive.

(c) No import restriction proclaimed by the President under this section nor any revocation, suspension, or modification thereof shall become effective until fifteen days after the date of such proclamation, revocation, suspension, or modification.

(d) Any decision of the President as to facts under this section shall be final.

(e) After investigation, report, finding, and declaration in the manner provided in the case of a proclamation issued pursuant to subsection (b) of this section, any proclamation or provision of such proclamation may be suspended by the President whenever he finds that the circumstances requiring the proclamation or provision thereof no longer exists, or may be modified by the President whenever he finds that changed circumstances require such modification to carry out the purposes of this section.[15]

Sec. 2. The following provisions, reenacted in section 1 of this act, are amended as follows: [16]

Sec. 3. (a) The Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated

[15] Sec. 5 of Public, No. 461, 74th Cong., approved February 29, 1936, amended sec. 22 of the Agricultural Adjustment Act, as amended, by inserting after the words "this title", wherever they appeared, the words "or the Soil Conservation and Domestic Allotment Act, as amended,"; and by deleting the words "an adjustment", wherever they appeared, and inserting in lieu thereof the word "any".

[16] Subsections (a) to (j) inclusive, of section 2 of the Agricultural Marketing Agreement Act of 1937 are incorporated in the preceding text and in footnotes 2 to 9 inclusive and 11 to 14 inclusive, supra.

by him, upon written application of any cooperative association, incorporated or otherwise, which is in good faith owned or controlled by producers or organizations thereof, of milk or its products, and which is bona fide engaged in collective processing or preparing for market or handling or marketing (in the current of interstate or foreign commerce, as defined by paragraph (i) of section 2 of this act), milk or its products, may mediate and, with the consent of all parties, shall arbitrate if the Secretary has reason to believe that the declared policy of the Agricultural Adjustment Act, as amended, would be effectuated thereby, bona-fide disputes, between such associations and the purchasers or handlers or processors or distributors of milk or its products, as to terms and conditions of the sale of milk or its products. The power to arbitrate under this section shall apply only to such subjects of the term or condition in dispute as could be regulated under the provisions of the Agricultural Adjustment Act, as amended, relating to orders for milk and its products.

(b) Meetings held pursuant to this section shall be conducted subject to such rules and regulations as the Secretary may prescribe.

(c) No award or agreement resulting from any such arbitration or mediation shall be effective unless and until approved by the Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated by him, and shall not be approved if it permits any unlawful trade practice or any unfair method of competition.

(d) No meeting so held and no award or agreement so approved shall be deemed to be in violation of any of the antitrust laws of the United States.

Sec. 4. Nothing in this act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed.

Sec. 5. No processing taxes or compensating taxes shall be levied or collected under the Agricultural Adjustment Act, as amended. Except as provided in the preceding sentence, nothing in this act shall be construed as affecting provisions of the Agricultural Adjustment Act, as amended, other than those enumerated in section 1. The provisions so enumerated shall apply in accordance with their terms (as amended by this act) to the provisions of the Agricultural Adjustment Act, this act, and other provisions of law to which they have been heretofore made applicable.

Sec. 6. This act may be cited as the "Agricultural Marketing Agreement Act of 1937."

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Appendix F

Issued July 28, 1937

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION

COMPILATION OF ORDER NO. 4 REGULATING THE HANDLING OF MILK IN THE GREATER BOSTON, MASS., MARKETING AREA, WITH THE INCORPORATION OF AMENDMENT NO. 1 OF AUGUST 1937

Order No. 4, issued by the Secretary of Agriculture February 7, 1936, effective 12:01 a. m., E. S. T., February 9, 1936; Amendment issued by the Secretary July 28, 1937, effective 12:01 a. m., E. S. T., August 1, 1937

The findings, made by the Secretary at the time of issuance of Order No. 4 and the amendment to Order No. 4, have been eliminated from this document for the sake of brevity.

ARTICLE I—DEFINITIONS

SECTION 1. *Terms.*—The following terms shall have the following meanings:

1. "Act" means the Agricultural Marketing Agreement Act of 1937 which reenacts and further amends Public, No. 10, 73d Congress, as amended.

2. "Secretary" means the Secretary of Agriculture of the United States.

3. "Greater Boston, Massachusetts, Marketing Area", hereinafter called the "Marketing Area", means the territory included within the boundary lines of the cities and towns of Arlington, Belmont, Beverly, Boston, Braintree, Brookline, Cambridge, Chelsea, Dedham, Everett, Lexington, Lynn, Malden, Marblehead, Medford, Melrose, Milton, Nahant, Needham, Newton, Peabody, Quincy, Reading, Revere, Salem, Saugus, Somerville, Stoneham, Swampscott, Wakefield, Waltham, Watertown, Wellesley, Weymouth, Winchester, Winthrop, and Woburn, Massachusetts.

4. "Person" means any individual, partnership, corporation, association, and any other business unit.

5. "Producer" means any person who, in conformity with the health regulations which are applicable to milk which is sold for consumption as milk in the Marketing Area, produces milk and distributes, or delivers to a handler, milk of his own production.

6. "Handler" means any person, irrespective of whether such person is a producer or an association of producers, wherever located or operating, who engages in such handling of milk, which is sold as milk or cream in the Marketing Area, as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects interstate or foreign commerce in milk and its products.

7. "Market Administrator" means the person designated pursuant to article II as the agency for the administration hereof.

8. "Delivery period" means the current marketing period from the first to, and including, the fifteenth day of each month, and from the sixteenth to, and including, the last day of each month.

ARTICLE II—MARKET ADMINISTRATOR

SECTION 1. *Selection, Removal, and Bond.*—The Market Administrator shall be selected by the Secretary and shall be subject to removal by him at any time. The Market Administrator shall, within 45 days following the date upon which he enters upon his duties, execute and deliver to the Secretary a bond, conditioned upon the faithful performance of his duties, in an amount and with surety thereon satisfactory to the Secretary.

SEC. 2. *Compensation.*—The Market Administrator shall be entitled to such reasonable compensation as may be determined by the Secretary.

SEC. 3. *Powers.*—The Market Administrator shall have power:

1. To administer the terms and provisions hereof;

2. To receive, investigate, and report to the Secretary complaints of violations of the terms and provisions hereof.

SEC. 4. *Duties.*—The Market Administrator, in addition to the duties hereinafter described, shall:

1. Keep such books and records as will clearly reflect the transactions provided for herein;

2. Submit his books and records to examination by the Secretary at any and all times;

3. Furnish such information and such verified reports as the Secretary may request;

4. Obtain a bond with reasonable security thereon covering each employee who handles funds entrusted to the Market Administrator;

5. Publicly disclose to handlers and producers, unless otherwise directed by the Secretary, the name of any person who, within 15 days after the date upon which he is required to perform such acts, has not (a) made reports pursuant to article V or (b) made payments pursuant to article VIII;

6. Employ and fix the compensation of such persons as may be necessary to enable him to administer the terms and provisions hereof; and

7. Pay, out of the funds provided by article X, (a) the cost of his bond and of the bonds of such of his employees as handle funds entrusted to the Market Administrator, (b) his own compensation, and (c) all other expenses which will necessarily be incurred by him for the maintenance and functioning of his office and the performance of his duties.

SEC. 5. *Responsibility.*—The Market Administrator, in his capacity as such, shall not be held responsible in any way whatsoever to any handler, or to any other person, for errors in judgment, for mistakes, or for other acts either of commission or omission, except for his own willful misfeasance, malfeasance, or dishonesty.

ARTICLE III—CLASSIFICATION OF MILK

SECTION 1. *Sales and Use Classification.*—Milk purchased or handled by handlers shall be classified as follows:

1. All milk sold or distributed as milk, chocolate milk, or flavored milk and all milk not specifically accounted for as Class II milk shall be Class I milk; and

2. Milk specifically accounted for (a) as being sold, distributed, or disposed of other than as milk, chocolate milk, or flavored milk and (b) as actual plant shrinkage within reasonable limits shall be Class II milk.

SEC. 2. *Inter-Handler or Non-Handler Sales.*—Milk, including skim milk, sold by a handler to another handler or to a person who is not a handler and who distributes milk or manufactures milk products shall be presumed to be Class I milk. In the event that such selling handler, on or before the date fixed for filing reports pursuant to article V, notifies the Market Administrator that such milk, or a part thereof, has been sold or used by such purchaser other than as Class I milk, such milk, or part thereof, shall be classified as Class II milk; provided, that if such selling handler does not, on or before the fifteenth day after the end of the delivery period during which such sale was made, furnish proof satisfactory to the Market Administrator in support of the above notification, such milk or part thereof shall then be classified as Class I milk and so included in the statement rendered to the selling handler pursuant to paragraph 3 of section 1 of article VIII.

ARTICE IV—MINIMUM PRICES

SECTION 1. *Class I Prices to Associations of Producers.*—Each handler shall pay any association of producers for Class I milk containing 3.7 percent butterfat not less than the following prices:

1. $3.31 per hundredweight for such milk delivered from the plant of such association to such handler's plant located not more than 40 miles from the State House in Boston;

2. $3.26 per hundredweight for such milk delivered from the plant of such association to such handler at a railroad delivery point not more than 40 miles from the State House in Boston; and

3. If such milk is delivered containing butterfat more or less than 3.7 percent such handler shall add or subtract, as the case may be, a differential for each one-tenth of one percent above or below 3.7 percent, which differential is the result of dividing by 830 the cream price used in paragraph 1 of section 3 of this article.

SEC. 2. *Class I Prices to Producers.*—Each handler shall pay producers, in the manner set forth in article VIII, for Class I milk delivered by them, not less than the following prices:

1. $3.19 per hundredweight for such milk delivered from producers' farms to such handler's plant located not more than 40 miles from the State House in Boston;

2. $3.01 per hundredweight for such milk delivered from producers' farms to such handler's plant located more than 40 miles from the State House in Boston, less an amount per hundredweight equal to the freight from the railroad shipping point for such handler's plant to such handler's railroad delivery point in the Marketing Area. Such freight shall be calculated according to applicable rail tariffs for the transportation in carlead lots of milk in 40-quart cans and each such can shall be considered to contain 85 pounds of milk;

3. For the purpose of this section the milk which was sold or distributed, during each delivery period, by each handler as Class I

milk shall be presumed to have been that milk which was received at such handler's plant located not more than 40 miles from the State House in Boston (a) directly from producers' farms and (b) from the nearest plants located more than 40 miles from the State House in Boston.

SEC. 3. *Class II Prices.*—Each handler shall pay producers, in the manner set forth in article VIII, for Class II milk not less than the following prices per hundredweight:

1. In the case of such milk delivered to a handler's plant located not more than 40 miles from the State House in Boston, a price which the Market Administrator shall calculate as follows: Divide by 33 the weighted average price per 40-quart can of bottling quality cream in the Boston market, as reported by the United States Department of Agriculture for the delivery period during which such milk is delivered, multiply the result by 3.7, and add 2.125 times the average of the weekly quotations per pound of domestic, 20–30 mesh, casein in bags delivered in carload lots at New York, as published by the Oil, Paint and Drug Reporter during such delivered period, and subtract 42 cents; and

2. In the case of such milk delivered to a handler's plant located more than 40 miles from the State House in Boston, the price calculated by the Market Administrator, pursuant to paragraph 1 of this section, minus 6 cents.

SEC. 4. *Sales Outside the Marketing Area.*—The price to be paid by each handler to associations of producers or to producers, in the manner set forth in article VIII, for milk utilized as Class I milk outside the Marketing Area, shall be the price applicable pursuant to sections 1 and 2 of this article adjusted by (a) the difference between such applicable price and the price ascertained by the Market Administrator as the prevailing price paid by processors for milk of equivalent use in the market where such Class I milk is utilized and (b) the difference between the freight allowance, if any, set forth in paragraph 2 of section 2 of this article and an amount equal to the carload freight rate approved by the Interstate Commerce Commission for movement of milk in 40-quart cans from the shipping point for the plant where such Class I milk is received from producers to the railroad delivery point serving the market where such Class I milk is sold; provided, that (1) if the market where such Class I milk is utilized is less than 10 miles from the plant where such Class I milk is received from producers, the railroad shipping point for such plant shall be presumed to be the railroad delivery point serving such market, and (2) if the market where such Class I milk is utilized is located in Barnstable, Plymouth, Norfolk, Dukes, and Nantucket Counties, Massachusetts, such handler's railroad delivery point in the Marketing Area shall be considered to be the railroad delivery point serving such market.

SEC. 5. *Publication of Class II Prices.*—On or before the fifth day after the end of each delivery period, the Market Administrator shall publicly announce the Class II price in effect for such delivery period.

ARTICLE V—REPORTS OF HANDLERS

SECTION 1. *Periodic Reports.*—On or before the eighth day after the end of each delivery period, each handler shall, except as set forth in section 1 of article VI, with respect to milk or cream which was, during such delivery period, (a) received from producers, (b) received from handlers, or (c) produced by such handler, report to the Market Administrator in the detail and form prescribed by the Market Administrator, as follows:

1. The receipts at each plant from producers who are not handlers;
2. The receipts at each plant from any other handler, including any handler who is also a producer;
3. The quantity, if any, produced by such handler; and
4. The respective quantities of milk which were sold, distributed, or used, including sales to other handlers, for the purpose of classification pursuant to article III.

SEC. 2. *Reports as to Producers.*—Each handler shall report to the Market Administrator:

1. Within 10 days after the Market Administrator's request with respect to any producer for whom such information is not in the files of the Market Administrator, and with respect to a period or periods of time designated by the Market Administrator, (a) the name and address, (b) the total pounds of milk delivered, (c) the average butterfat test of milk delivered, and (d) the number of days upon which deliveries were made; and
2. As soon as possible after first receiving milk from any producer: (a) The name and address of such producer, (b) the date upon which such milk was first received, (c) the plant at which such producer delivered milk, and (d) the plant, if known, at which such producer delivered milk immediately prior to the beginning of delivery to such handler.

SEC. 3. *Reports of Payments to Producers.*—Each handler shall submit to the Market Administrator within 30 days after the end of each delivery period his producer payroll for such delivery period which shall show for each producer: (a) The total delivery of milk with the average butterfat test thereof and (b) the net amount of such producer's payment, with the prices, deductions, and charges involved.

SEC. 4. *Outside Cream Purchases.*—Each handler shall report, as requested by the Market Administrator, his purchases, if any, of bottling quality cream from handlers who receive no milk from producers, showing the quantity and the source of each such purchase and the cost thereof at Boston.

SEC. 5. *Verification of Reports.*—In order that the Market Administrator may submit verified reports to the Secretary pursuant to paragraph 3 of section 4 of article II, each handler shall permit the Market Administrator or his agent, during the usual hours of business, to (a) verify the information contained in reports submitted in accordance with this article and (b) weigh, sample, and test milk for butterfat.

ARTICLE VI—HANDLERS WHO ARE ALSO PRODUCERS

SECTION 1. *Application of Provisions.*—No provision hereof shall apply to a handler who is also a producer and who purchases no milk from producers or an association of producers, except that such handler shall make reports to the Market Administrator at such time and in such manner as the Market Administrator may request.

SEC. 2. *Milk Purchased from Producers.*—In the case of a handler who is also a producer and who purchased milk from producers, the Market Administrator shall, before making the computations set forth in article VII, (a) exclude from such handler's class I milk up to but not exceeding 90 percent of the quantity of milk produced and sold by him, (b) exclude the milk purchased by him in each class from other handlers, and (c) exclude from his remaining Class II milk the balance of the milk produced and sold by him.

ARTICLE VII—DETERMINATION OF UNIFORM PRICES TO PRODUCERS

SECTION 1. *Computation of Value of Milk for Each Handler.*—For each delivery period the Market Administrator shall compute, subject to the provisions of article VI, the value of milk sold or used by each handler, which was not purchased from other handlers, by (a) multiplying the quantity of such milk in each class by the price applicable pursuant to sections 2, 3, and 4 of article IV and (b) adding together the resulting value of each class.

SEC. 2. *Computation and Announcement of Uniform Prices.*—The Market Administrator shall compute and announce the uniform prices per hundredweight of milk delivered during each delivery period in the following manner:

1. Combine into one total the respective values of milk, computed pursuant to section 1 of this article, for each handler who made the report as required by section 1 of article V for such delivery period and who made the payments required by article VIII for milk received during the delivery period next preceding but one;

2. Add the total net amount of the differentials applicable pursuant to section 4 of article VIII;

3. Subtract the total amount to be paid to producers pursuant to paragraph 2 of section 1 of article VIII;

4. Divide by the total quantity of milk which is included in these computations except that milk required to be paid for pursuant to paragraph 2 of section 1 of article VIII;

5. Subtract not less than 4 cents nor more than 5 cents for the purpose of retaining a cash balance in connection with the payments set forth in paragraph 3 of section 1 of article VIII;

6. Add an amount which will prorate, pursuant to section 3 of this article, any cash balance available; and

7. On or before the twelfth day after the end of each delivery period mail to all handlers and publicly announce (a) such of these computations as do not disclose information confidential pursuant to the Act, (b) the blended price per hundredweight which is the result of these computations, and (c) the Class II price.

SEC. 3. *Proration of Cash Balance.*—For each delivery period the Market Administrator shall prorate, by an appropriate addition pur-

suant to section 2 of this article, the cash balance, if any, in his hands from payments made by handlers for milk received during the delivery period next preceding but one, to meet obligations arising out of paragraph 3 of section 1 of article VIII.

ARTICLE VIII—PAYMENTS FOR MILK

SECTION 1. *Time and Method of Payment.*—On or before the twenty-fifth day after the end of each delivery period, each handler shall make payment, subject to the butterfat differential set forth in section 3 of this article, for the total value of milk received during such delivery period as required to be computed pursuant to section 1 of article VII, as follows:

1. To each producer, except as set forth in paragraph 2 of this section, at the blended price per hundredweight computed pursuant to section 2 of article VII, subject to the differentials set forth in section 4 of this article, for the quantity of milk delivered by such producer;

2. To any producer, who did not regularly sell milk for a period of 30 days prior to the effective date hereof to a handler or to persons within the Marketing Area, at the Class II price, in effect for the plant at which such producer delivered milk, for all the milk delivered by such producer during the period beginning with the first regular delivery of such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month;

3. To producers, through the Market Administrator, by paying to or receiving from the Market Administrator, as the case may be, the amount by which the payments made pursuant to paragraphs 1 and 2 of this section are less than, or exceed, the value of milk as required to be computed for such handler pursuant to section 1 of article VII, as shown in a statement rendered by the Market Administrator on or before the twentieth day after the end of such delivery period.

SEC. 2. *Errors in Payments.*—Errors in making any of the payments prescribed in this article shall be corrected not later than the date for making payments next following the determination of such errors.

SEC. 3. *Butterfat Differential.*—If any producer has delivered to any handler during any delivery period milk having an average butterfat content other than 3.7 percent, such handler shall, in making the payments prescribed by paragraphs 1 and 2 of section 1 of this article to such producer, add for each one-tenth of 1 percent of average butterfat content above 3.7 percent or deduct for each one tenth of 1 percent of average butterfat content below 3.7 percent an amount per hundredweight which shall be calculated by the Market Administrator as follows: Divide by 33 the weighted average price per 40-quart can of bottling quality cream in the Boston market, as reported by the United States Department of Agriculture for the delivery period during which such milk is delivered, subtract 8 cents, and divide the result by 10.

SEC. 4. *Location Differentials.*—The payments to be made to producers by handlers pursuant to paragraph 1 of section 1 of this article shall be subject to differentials as follows:

1. With respect to milk delivered by a producer to a handler's plant located more than 40 miles from the State House in Boston, there shall be deducted an amount per hundredweight equal to the freight (considering 85 pounds of milk per can), according to the tariff currently approved by the Interstate Commerce Commission for the transportation, in carload lots of milk in 40-quart cans, to Boston from the zone of location of the handler's plant.

2. With respect to milk delivered by a producer to a handler's plant located not more than 40 miles from the State House in Boston, there shall be added 18 cents per hundredweight.

3. With respect to milk delivered by a producer, whose farm is located more than 40 miles, but not more than 80 miles, from the State House in Boston, there shall be added 23 cents per hundredweight.

4. With respect to milk delivered by a producer, whose farm is located not more than 40 miles from the State House in Boston, there shall be added 46 cents per hundredweight unless such addition gives a result greater than $3.19, in which event there shall be added an amount which will give a result of $3.19.

SEC. 5. *Other Differentials.*—In making the payments to producers set forth in paragraphs 1 and 2 of section 1 of this article, handlers may make deductions as follows:

1. With respect to all milk delivered by producers to the plant of a handler which is located more than 40 miles from the State House in Boston and which is located more than 2 miles from a railroad shipping point, an amount not greater than .10 cents per hundredweight; provided, that such deduction has been approved and made public by the Market Administrator prior to the time of payment.

2. With respect to milk delivered by producers to a handler's plant which is located more than 14 miles, but not more than 40 miles from the State House in Boston, an amount equal to 10 cents per hundredweight of Class I milk actually sold or distributed in the Marketing Area from such plant, such total amount to be deducted pro rata on all milk delivered by such producers.

3. With respect to milk delivered by producers to any handler's plant from which the average daily shipment of Class I milk during any delivery period is less than 21,500 pounds, an aggregate amount, pro rated among producers delivering milk to such plant, equal to the difference between the freight to the marketing area at the carload rate and at the less than carload rate for the Class I milk shipped during such delivery period.

ARTICLE IX—MARKETING SERVICES

SECTION 1. *Deductions for Marketing Services.*—Except as set forth in section 2, each handler shall deduct an amount not exceeding 2 cents per hundredweight (the exact amount to be determined by the Market Administrator, subject to review by the Secretary) from the payments made direct to producers pursuant to article VIII with respect to all milk delivered to such handler during each delivery period by producers and shall pay such deductions to the Market Administrator on or before the twenty-fifth day after the end of

such delivery period. Such monies shall be expended by the Market Administrator for market information to, and for verification of weights, sampling, and testing of milk purchased from, said producers.

SEC. 2. *Producers' Cooperative Association.*—In the case of producers for whom a cooperative association, which the Secretary determines to be qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act", is actually performing, as determined by the Secretary, the services set forth in section 1 of this article, each handler shall make, in lieu of the deductions specified in section 1 of this article, such deductions from the payments to be made direct to such producers, pursuant to article VIII, as are authorized by such producers and, on or before the twenty-fifth day after the end of each delivery period, pay over such deductions to the association rendering such service.

ARTICLE X—EXPENSE OF ADMINISTRATION

SECTION 1. *Payments by Handlers.*—As his pro rata share of the expense of the administration hereof, each handler, except as set forth in section 1 of article VI, shall, on or before the twenty-fifth day after the end of each delivery period, pay to the Market Administrator a sum not exceeding 2 cents per hundredweight with respect to all milk actually delivered to him during such delivery period by producers or produced by him, the exact sum to be determined by the Market Administrator subject to review by the Secretary; provided, that each handler, which is a cooperative association of producers, shall pay such pro rata share of expense of administration only on that milk actually received from producers at a plant of such association.

SEC. 2. *Suits by Market Administrator.*—The Market Administrator may maintain a suit in his own name against any handler for the collection of such handler's pro rata share of expense set forth in this article.

ARTICLE XI—EFFECTIVE TIME, SUSPENSION, AND TERMINATION

SECTION 1. *Effective Time.*—The provisions hereof, or any amendment hereto, shall become effective at such time as the Secretary may declare and shall continue in force until suspended or terminated, pursuant to section 2 of this article.

SEC. 2. *Suspension and Termination.*—Any or all provisions hereof, or any amendment hereto, shall be suspended or terminated as to any or all handlers after such reasonable notice as the Secretary may give, and shall, in any event, terminate whenever the provisions of the act authorizing it cease to be in effect.

SEC. 3. *Effect.*—Unless otherwise provided by the Secretary in the notice of amendment, suspension, or termination of any or all provisions hereof, the amendment, suspension, or termination shall not (a) affect, waive, or terminate any right, duty, obligation, or liability which shall have arisen or may thereafter arise in connection with any provisions hereof; (b) release or waive any violation hereof occurring prior to the effective date of such amendment, suspension, or

termination; (c) affect or impair any rights or remedies of the Secretary, or of any other person, with respect to any such violation.

SEC. 4. *Continuing Power and Duty.*—If, upon the suspension or termination of any or all provisions hereof, there are any obligations arising hereunder, the final accrual or ascertainment of which requires further acts by any handlers, by the Market Administrator, or by any other person, the power and duty to perform such further acts shall continue notwithstanding such suspension or termination; provided, that any such acts required to be performed by the Market Administrator shall, if the Secretary so directs, be performed by such other person, persons, or agency as the Secretary may designate.

The Market Administrator, or such other person as the Secretary may designate, (a) shall continue in such capacity until discharged by the Secretary, (b) from time to time account for all receipts and disbursements and deliver all funds or property on hand, together with the books and records of the Market Administrator, or such person, to such person as the Secretary shall direct, and (c) if so directed by the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such person full title to all funds, property, and claims vested in the Market Administrator or such person pursuant hereto.

SEC. 5. *Liquidation After Suspension or Termination.*—Upon the suspension or termination of any or all provisions hereof the Market Administrator, or such person as the Secretary may designate, shall if so directed by the Secretary, liquidate the business of the Market Administrator's office, and dispose of all funds and property then in his possession or under his control, together with claims for any funds which are unpaid and owing at the time of such suspension or termination. Any funds collected pursuant to the provisions hereof, over and above the amounts necessary to meet outstanding obligations and the expenses necessarily incurred by the Market Administrator or such person in liquidating and distributing such funds, shall be distributed to the contributing handlers and producers in an equitable manner.

ARTICLE XII—LIABILITY

SECTION 1. *Handlers.*—The liability of the handlers hereunder is several and not joint and no handlers shall be liable for the default of any other handler.